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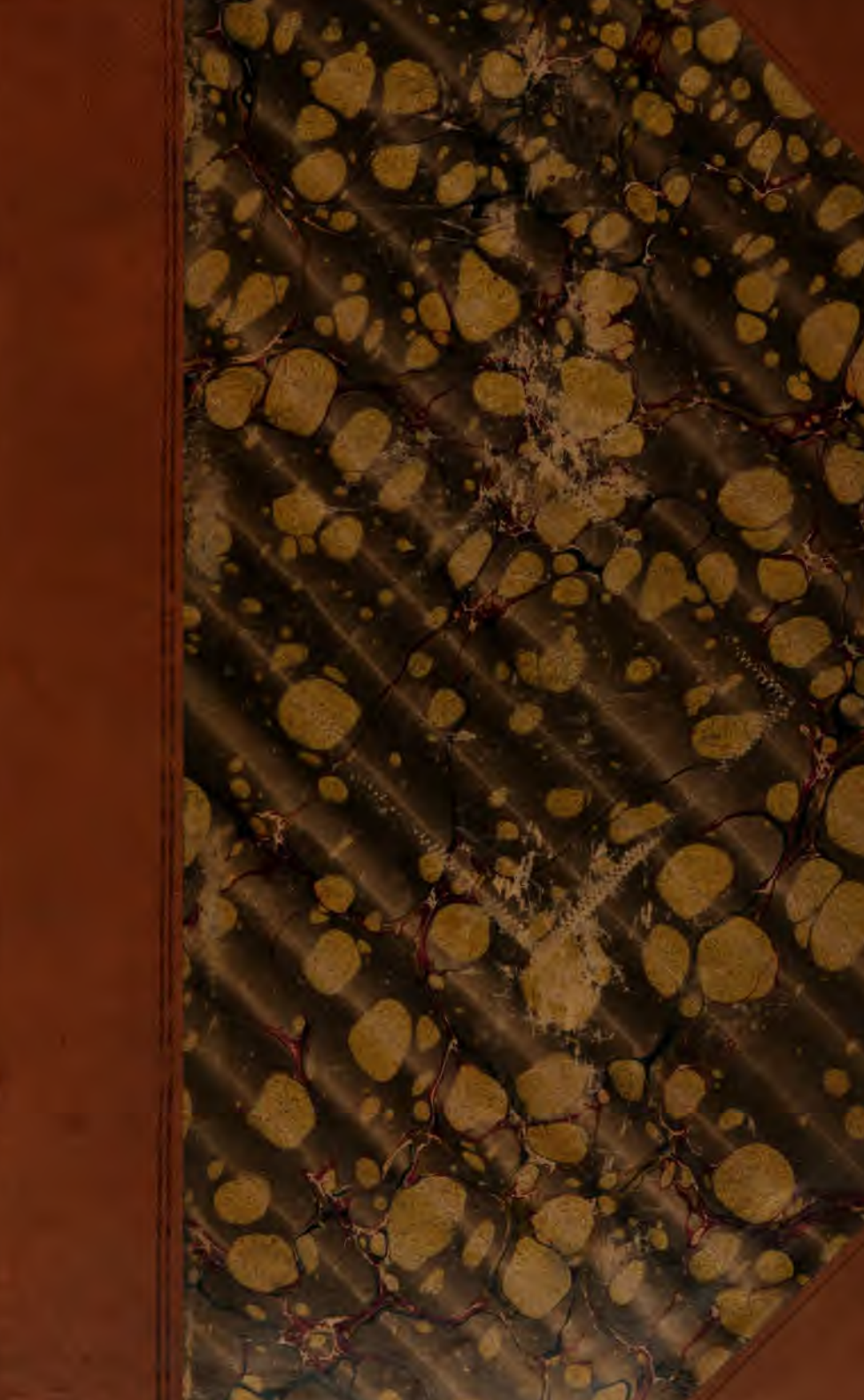
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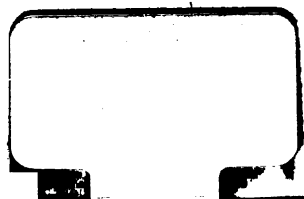
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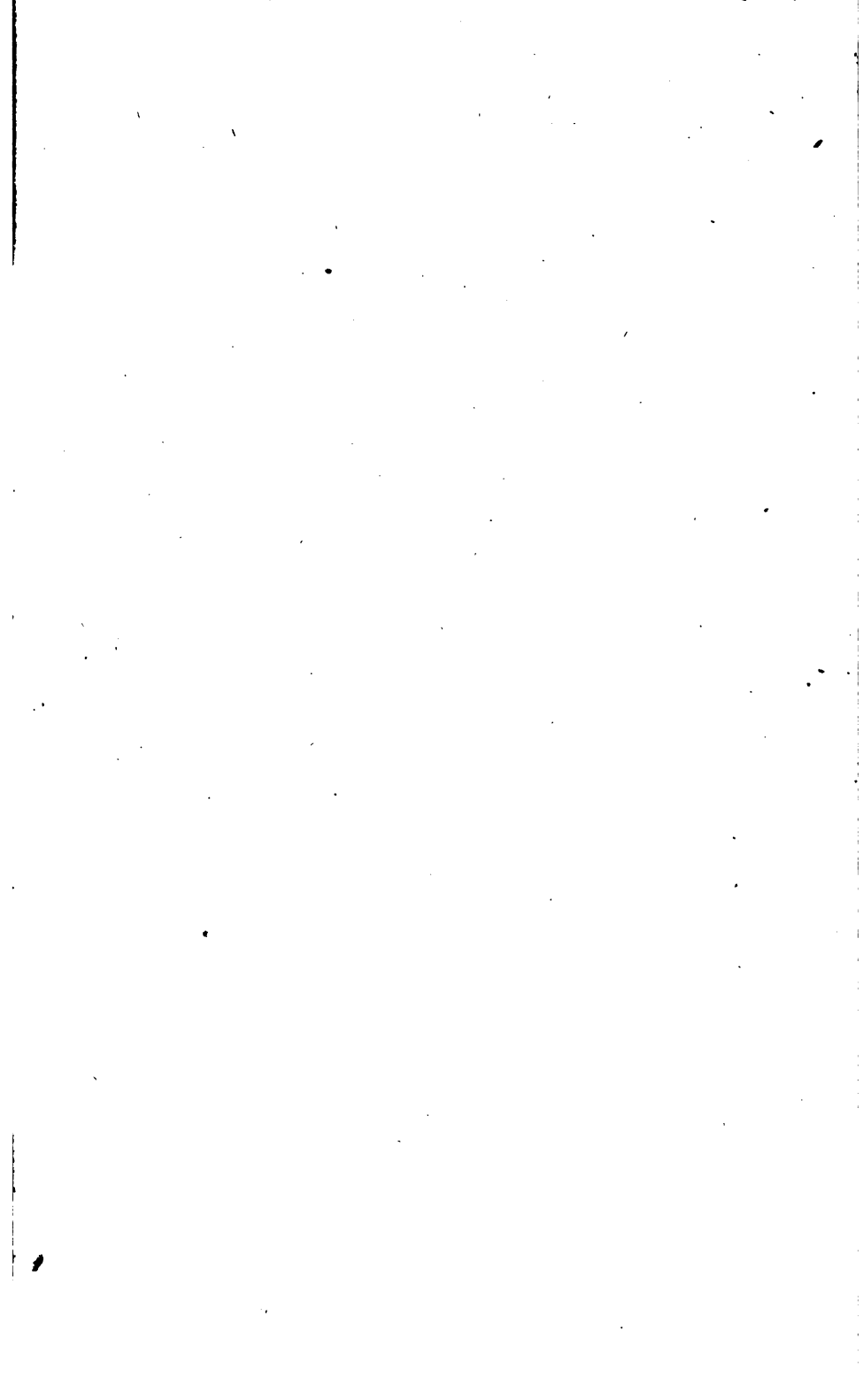
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THE LAW MAGAZINE.

THE SIXTH CRIMINAL LAW REPORT.

Sixth Report of Her Majesty's Commissioners on Criminal Law. Dated the 3rd day of May, 1841. Presented to both Houses of Parliament by command of Her Majesty. London. 1841.

THE subjects comprised in this Report are, Treason and other Offences against the State; Libel; Offences against Religion; Offences relating to the Coin; and Offences relating to the Public Revenue. The plan is that adopted in most of the preceding Reports. The present condition of the law is described in "Prefatory Remarks;" and there follows an annotated Digest of it as it stands. We shall endeavour to give as full an abstract of the contents as our limits will allow.

The prefatory remarks on Treason commence with an assumption which few will be inclined to dispute,—that the peculiar character of the offence suggests ample and urgent reasons for defining it with the greatest care, excluding all forced constructions, insuring fair play to the accused party, and exacting a larger measure of evidence than might be deemed sufficient in ordinary cases of alleged guilt. History, however, shows that these considerations have been almost uniformly disregarded; and it is an undoubted fact that the doctrines or principles most likely to be brought into play in modern times rest much more on technical reasoning than on the plain letter of the statutes.

The Statute of Treasons was passed in the twenty-fifth year of Edward the Third to protect the subject against the king, whose justices were beginning to hold everything to be treason which directly or indirectly diminished his dignity or

affected his prerogatives; for example, killing his father, brother, or even messenger. In the twenty-first year of Edward the Third a knight of Hertfordshire was adjudged a traitor for forcibly detaining a man till he paid him 90*l.*; this being oddly enough deemed an attempt to exercise royal power. This celebrated statute, to which most of the Commissioners' remarks relate, runs thus :

“ Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the king, at the request of the lords and commons, hath made a declaration in the manner as hereafter followeth, that is to say, when a man doth compass or imagine the death of our lord the king, or of our lady his companion, or of their eldest son and heir;

“ Or if a man do violate the king's companion, or king's eldest daughter unmarried, or the companion of the king's eldest son and heir;

“ Or if a man do levy war against our lord the king in his realm;

“ Or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere;

“ And thereof be probably attainted of open deed by the people of their condition;

“ And if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices;

“ And it is to be understood that in the cases above rehearsed that ought to be adjudged treason which extends to our lord the king and his royal majesty; and of such treason the forfeiture of the escheats pertaineth to our sovereign lord, as well of the lands and tenements holden of other as of himself;

“ And because many other like cases of treason may happen in time to come which a man cannot think nor declare at this present time, it is accorded that if any other case supposed treason which is not above specified doth happen before any justices, the justices shall tarry without any going to judgment of the treason till the cause be showed and declared before the king and his parliament whether it ought to be adjudged treason or other felony. And if per case any man of this realm ride armed covertly or secretly with men of arms against any other, to slay him or rob him, or take him or retain him till he hath made fine or ransom for to have his deliverance, it is not the mind of the king nor his council, that in such case it shall be judged treason, but shall be judged felony or tres-

pass, according to the laws of the land of old time used, and according as the case requireth."

We need hardly say that this statute often proved an insufficient barrier against judicial incroachment during times of trouble, or that succeeding monarchs added greatly to the list. Henry the Eighth alone invented treasons enough to bring the allegiance of the better half of his subjects into question. These were all swept away by his daughter, Queen Mary, at the very commencement of her reign, before she had obtained or merited the appellation which constitutes her chief claim to immortality. Beccaria himself could hardly have prompted a more humane or philosophic preamble than that of an Act passed in the first session of her reign, for the purpose of re-establishing the authority of the 25th Edward III., and making it once again the sole standard of treason.

"For that whereas the state of every king consists more assuredly in the love of the subjects towards their prince than in the dread of laws made by rigorous pain, and that laws made for the preservation of the commonwealth, without great pains, are more often obeyed and kept than laws made with extreme punishments. And, in special, such laws so made whereby not the ignorant but also the learned, minding honesty, are often trapped; yea, many times for words only, without other fact or deed done or perpetrated; and thereupon the queen calls to remembrance that many, as well honourable persons as others of good reputation, had then of late, for words only, without other opinion, fact, or deed, suffered shameful death, and expresses her pleasure that the severity of such like extreme, dangerous, and painful laws shall be abolished."

The law has since undergone various important changes; many temporary, and a few permanent. The most important of the latter class are thus mentioned in the Report:

"Of those now in force, two of the reign of Queen Elizabeth were enacted against the maintaining the authority of the Pope or other foreign prince or person within the realm; one of the reign of King James I., against the withdrawing the subjects of this realm from their natural obedience to his Majesty, or endeavouring to reconcile them to the See of Rome, or to promise obedience to the See of Rome, or to any other prince, state, or potentate; two of the reign of Queen Anne, against hindering the due succession to the crown, or

asserting any title to the crown otherwise than according to the statutes 1 King Will. and Queen Mary, sess. 2, c. 2, and 12 King Will. III., c. 2, and the Acts for the union of England and Scotland, or asserting that the kings or queens of the realm, with the authority of parliament, are not able to make laws and statutes of sufficient force to limit the crown and the descent thereof; a statute of the thirty-sixth year of the reign of King George III., which, embodying some of the more important constructions upon the Statute of Treasons raised in the course of several centuries, makes it treason to compass the levying of war against the sovereign, in order to compel him to change his measures, or to put any force or constraint upon, or to intimidate or overawe either house of parliament, or to move or stir any foreigner or stranger with force to invade the realm; and lastly, an Act of the 3d and 4th years of your Majesty's reign, whereby it was made treason to be married to, or to be concerned in procuring or bringing about the marriage of the king or queen, for whom a regent is by that Act appointed, being under the age of eighteen years, without the consent in writing of the regent, and the assent of both houses of parliament previously obtained."

The first remark of the Commissioners relates to overt acts. The words of the Statute of Treason being "compass or imagine," intention is obviously the essence of the offence, but as it is required that the accused shall "be probably attainted of open deed," the intention must be manifested by some act tending towards the accomplishment of the alleged design. An act innocent in itself will suffice. Thus, in Lord Preston's case, embarking on board a vessel for the purpose of prosecuting a treasonable project in foreign parts, was held an overt act.

The better opinion, also, is that a distinct act of treason may constitute an overt act of a different species. Thus, according to Sir Matthew Hale, levying war against the sovereign may constitute an overt act under a charge of compassing his death. Coke, however, holds the contrary, and Hale appears to have wavered upon the point.

The extent to which words or writings of a seditious nature may be regarded as overt acts, has been much doubted, but

the question is now looked upon as settled, and apparently in strict accordance with reason and good sense. The received doctrine is thus laid down by Sir M. Foster, in his Discourse on the Law of High Treason :

“As to mere words supposed to be treasonable, they differ widely from writings in point of real malignity and proper evidence. They are often the effect of mere heat of blood, which, in some natures otherwise well disposed, carrieth the man beyond the bounds of decency or prudence. They are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal. And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words, *not relative to any act or design*, are not overt acts of treason; but words of advice or persuasion, and all consultations for the traitorous purposes treated of in this chapter, are certainly so: they are uttered in contemplation of some traitorous purpose actually on foot or intended, and *in prosecution of it.*”

As to writings he says, “they are permanent things, and, if published, they scatter the poison far and wide; they are acts of deliberation, capable of satisfactory proof, and not ordinarily liable to misconstruction; at least, they are submitted to the judgment of the court naked and undisguised, as they came out of the author’s hands. Words are transient and fleeting as the wind; the poison they scatter is at the worst confined to the narrow circle of a few hearers: they are frequently the effect of a sudden transport, easily misunderstood and often misreported.”

Still writings must be published to constitute an overt act; and the case of Peacham is not to be regarded as an authority. The evidence against him consisted of a manuscript sermon, never preached or published, containing some treasonable passages. He was found guilty, but not executed. Coke says that many of the judges thought the conviction erroneous, and Foster states circumstances connected with the judgment which prove it to be one of those which say little for the uprightness of the Bench. No allusion is made to Algernon Sydney’s case, in which it was held that writings of a speculative character, found in his closet, were equivalent to a

second witness against the prisoner. The admitted absurdity of the decision dispenses with the necessity of comment.

The Commissioners close this topic by observing that the received doctrine regarding words and writings should be formally sanctioned by the legislature.

The text which still gives rise to the greatest difficulty in interpretation is that relating to the levying war against the king, and we quite agree with the Commissioners that a very forced and unjustifiable construction has been put upon it. If we were to follow up the leading decisions to their consequences, every riotous rising or assembly in defiance of the law, with a general or undefined purpose, would be treason. In the case of Bradshaw and Burton (1597), a majority of the judges held that it was an intending to levy war against the sovereign (within 13 Eliz. c. 1.) to agree to arm and pull down inclosures generally. The other principal decisions are thus mentioned in the Report.

"In Benstead's case, (1640,) it was resolved that going to Lambeth House in a warlike manner, to surprise the archbishop, who was a privy councillor, it being with drums and a multitude (as the indictment was to the number of three hundred persons), was treason."

"In the case of Messenger (1668), it was held that a tumultuous rising of four hundred or five hundred persons, some of whom had clubs and swords, with a green apron borne on a pole for an ensign, led by one with a drawn sword, who cried 'Down with the bawdy-houses,' and proceeded to pull them down tumultuously, and beat a constable who opposed them, was levying war against the king, and high treason within the Statute of Treasons. Eleven judges, upon full consideration of a special verdict, were of this opinion, contrary to that of Lord Hale, then Chief Baron, who was the only dissentient. Chief Justice Kelyng states their resolution as follows: 'This rising with intent to pull down bawdy-houses *in general*, or to break open prisons *in general* and let out prisoners, and putting their intention in execution by force, in any of these instances, is a levying war against the king, and high treason at common law within the declaration of the statute 25 Edw. III.'

"Lord Hale gave the following reasons for his dissent from this resolution. 1st. Because it seemed but an unruly com-

pany of apprentices; 2ndly. Because the finding 'to pull down bawdy-houses' might reasonably be intended of two or three particular bawdy-houses, and the indefinite expression should not, *in materia odiosa*, be construed either universally or generally; 3rdly. Because the statute 1 Mar. c. 12, though now discontinued, makes assemblies of above twelve persons and of as high a nature only felony, and that not without a continuance together one hour after proclamation made.

"The case of Damaree (1709) has been considered the leading one on this subject. It is entitled to much greater weight than those which preceded it, as it is not subject to the charges of hasty and unfair dealing, from which some of those which occurred before the Revolution are not exempt. This was, however, a case in which the decisions already alluded to had great influence, having been ruled (according to Mr. Justice Foster) 'on consideration of former precedents.' The prisoner was the leader of a mob, which, during the trial of Dr. Sacheverell, became very riotous in support of his cause and party. They had attended the doctor from Westminster to the Temple, and continued together for some time in King's Bench Walk, crying, among other cries of the day, 'Down with the Presbyterians.' At length it was proposed to pull down the meeting-houses, and thereupon the cry became general, 'Down with the meeting-houses;' and some thousands immediately moved towards a meeting-house in Lincoln's-inn-fields, which they soon demolished, and burnt the pews, pulpit, and other materials. After they had finished at that place, they agreed to proceed to the rest of the meeting-houses; and hearing that the guards were coming to disperse them, they agreed, for the greater dispatch, to divide into several bodies, and to attack different houses at the same time, and many were that night in part demolished and the materials burnt. The prisoner Damaree put himself at the head of a party, which drew off from Lincoln's-inn-fields and demolished a meeting-house in Drury-lane, and burnt the materials in the street: the mob continually crying they would pull them all down that night.

"Upon the trial all the judges present were of opinion that the prisoner was guilty of high treason in levying war against the Queen; 'for here was a rising with an avowed intention to demolish *all* meeting-houses in general, and this the rioters

carried into execution as far as they were able. If the meeting-houses of Protestant dissenters had been erected and supported in defiance of all law, a rising in order to destroy such houses *in general* would have fallen under the rule laid down in Kelyng with respect to demolishing all bawdy-houses. But since the meeting-houses of protestant dissenters are, by the Toleration Act, taken under the protection of the law, the insurrection in the present case was to be considered as a public declaration by the rabble against that Act, and an attempt to render it ineffectual by numbers and open force.”

The rules deducible from these decisions have been extracted and stated by Mr. Justice Foster, who is quoted at some length by the Commissioners.¹ He repudiates the distinction taken by Lord Hale between insurrections under regular leaders with drums, colours, &c., a distinction much pressed but disregarded by the judges in the cases of Damaree and Purchase, and adopts as the leading criterion the absence of any private end, and the generality of the attempt or intention :

“ ‘ Risings to maintain a *private* claim of right, or to destroy *particular* inclosures, or to remove nuisances which affected or were thought to affect *in point of interest the parties assembled for these purposes*, or to break prisons in order to release *particular* persons without any other circumstance of aggravation, have not been holden to amount to levying war within the statute.

“ ‘ And upon the same principle and within the same equity of the statute, I think it was very rightly holden by five of the judges, that a rising of the weavers in and about London to destroy all engine-looms, machines which enabled those of the trade who make use of them to undersell those who had them not, did not amount to levying war within the statute ; though great outrages were committed on that occasion, not only in London but in the adjacent counties, and the magistrates and peace-officers were resisted and affronted. For those judges considered the whole affair merely as a private quarrel between men of the same trade about the use of a particular engine, which those concerned in the rising thought detrimental to them.’

“ ‘ Insurrections in order to throw down *all* inclosures, to alter the established law or change religion, to enhance the price of *all* labour, or to open *all* prisons, all risings in order to effect these

¹ A lucid exposition of the law was given by the Chief Justice of the Common Pleas at the trial of Frost.

innovations of a public and general concern by an armed force are, in construction of law, high treason, within the clause of levying war ; for though they are not levelled at the person of the king, they are against his royal majesty ; and besides, they have a direct tendency to dissolve all the bonds of society, and to destroy all property and all government too, by numbers and an armed force. Insurrections likewise for redressing national grievances, or for the expulsion of foreigners in general, or indeed of any single nation living here under the protection of the king, or for the reformation of real or imaginary evils *of a public nature, and in which the insurgents have no special interest*, risings to effect these ends by force and numbers are, by construction of law, within the clause of levying war : for they are levelled at the king's crown and royal dignity.' ”

These distinctions are hardly defensible on any ground. Men may levy war from a private motive ; or they may make a general attack on an entire class of objects or persons, without entertaining the most distant notion of shaking off their allegiance to the crown. The real question is, or ought to be, whether the parties have been guilty of rebellion in the ordinary popular acceptance of the term. The objection, however, principally relied on by the Commissioners is the difficulty of applying these rules in practice :

“ According to the doctrine laid down by the judges in the cases cited, the insurrection, to be constructively treasonable, must extend to the throwing down *all* inclosures, or the enhancing the price of *all* labour, or to open *all* prisons. This must either mean that the intention shall be absolutely *universal*, or that it shall be *general* in respect of number or place, or that an intention *indefinite* in point of extent shall be deemed to be sufficient. It will, we believe, be found upon inquiry that no one of these predicaments can consistently be established as an adequate measure and test to be applied to the crime of treason. If proof were required to be given of such an universal intention to effect the mischief, it would rarely, if ever, happen that *offenders* could justly be convicted of having formed so extensive a project, such offences being usually committed without premeditation, upon some sudden excitement ; and were it otherwise, the bringing the offence within the scope of the law on the principle of universality, to the exclusion of all cases where the intention, though not confined to particulars, was yet not universal,

would be quite inconsistent with the real nature of the offence supposed to be constituted, viz., a levying of war against the king's crown and royal dignity; for if the rising to throw down all inclosures throughout the realm was a levying of war, so also must a rising for the purpose of doing the like in a particular portion of the realm, *e. g.* in that part of England which lies north of Trent; it is no more possible, in any legal view of the case, to consider the larger attempt to be treason, and the more limited one a misdemeanor, than it would be to regard an actual levying of war in the one case to be treason, and in the latter to be an offence of lower quality. Whatever may be the danger or injury to the crown or royal dignity which constitutes treason in the one case, must also constitute an offence of the like nature in the other; for the crime of treason in levying war must depend, as the act of levying war itself must, not on the scale of preparation made, or force used, or extent of territory seized or laid under contribution, but on the nature and quality of the act done: the occupation of a single acre of ground, or single castle or fort, may be as unequivocal an act of levying war as if a whole county had been occupied. Mr. Justice Foster says, this holding a castle or fort against the king or his forces, if actual force be used to keep possession, is levying war."

This reasoning is just, though the last is an unsatisfactory illustration. To make the analogy complete, the purpose as well as the act should be limited to a single castle or fort. Neither are we quite satisfied with the logic of the following passage touching the Weavers' case, in which it was held by five of the judges, that a rising of the weavers in and about London, to destroy all engine looms, did not amount to a levying of war:

"It is to be observed that the judges, who held that this case was not treason, seem to have relied on the consideration that the affair was merely a private quarrel between men of the same trade about the use of a particular engine, which those concerned in the rising thought detrimental to them. With deference, however, to such authority, we cannot but think it exceedingly questionable whether a sense of private detriment can properly be available as any colour or excuse for an outrage of such a nature. Since the Weavers' case, the

destruction of machinery has in some instances been made capital, numerous prosecutions for such offences have of late years taken place, but it has never been urged, that we are aware of, even in mitigation of punishment, that the offenders were actuated by motives of self-interest."

The question is not, whether a sense of private detriment can properly be available as an excuse, but whether this destroys the treasonable character of the rising.

The next paragraph is also open to doubt :

" Besides the instances above adverted to, in respect of which the proposed line of distinction between treason and other offences appears to us to be insufficient, many other anomalies would result from such a principle of limitation. We refer to one in particular. In Bradshaw and Burton's case it was said by all the judges but three, that if any assemble themselves to lay violent hands upon the magistrate, as upon the mayor of London and the like, and with force attempt to put it into action, that this is rebellion and treason at common law. So that whilst by the express provision of the Statute of Treason the killing of the lord chancellor or one of the judges is not treason, unless he be sitting in judgment, the laying violent hands upon an ordinary magistrate might, it seems, by construction, be deemed treason."

The judges did not hold that the laying violent hands on an ordinary magistrate (which might be the unpremeditated act of an individual) was treason within the statute, but that assembling for the purpose, and attempting to effectuate it by force, was rebellion and treason at common law.

The Commissioners proceed to argue at considerable length a proposition which, we incline to think, most readers will readily concede to them,—that constructive extensions of the penal law, always dangerous and objectionable, are peculiarly to be avoided in dealing with political offences, and that constructive treasons should be superseded or rendered useless by positive provisions. The grand error, as they suggest, lay originally in making the criminality of the act depend not so much on its nature as on its consequences. An illegal outbreak of any sort, it was contended, sets the authority of the government at defiance, and is indirectly levelled at the dignity of the crown, which is all that can be effected by an unsuc-

cessful levying of war: *therefore*, an illegal outbreak is identical with a levying of war. "The effect of this doctrine has been to bring within the scope of this branch of the law of treason many classes of offences; and thus a great multitude of acts, which no man of plain reason and understanding, whose mind had not been sharpened to some considerable degree of artificial and technical subtlety, would regard as a levying of war against the crown, and which are even expressly recognised by the law as offences of a known and inferior degree, are construed to be treasons. It could not, however, escape the attention of those who sanctioned this constructive doctrine, that without some restraint it would include all offences to be effected by force and numbers, which could be regarded, in the technical language of an indictment, to be against the king's crown and dignity. And it therefore became necessary to prescribe limitations for confining and narrowing the extent of the doctrine. We have endeavoured to show that such limitations would be ineffectual as practical limits to this branch of the law, the operation of which would be left vague and uncertain. We may further observe that these limitations are merely arbitrary, and, so far from being referable to any just principle, that they are inconsistent even with the very principle on which the constructive doctrine is founded. If the throwing down of inclosures by numbers and with force can be deemed to be treasonable, because indirectly it is an offence against the crown and royal dignity, so must every single act of destruction be which is effected by the same persons, the same tools, and with equal force. All such limitations are, in truth, arbitrary and artificial limitations of an artificial crime, created by the strained construction of a statute framed for the express purpose of making the law of treason plain and definite."

An equally strained construction is that put upon the first provision of the statute as to compassing or imagining the death. On the trial of the Duke of Norfolk, the counsel for the crown contended that the maintenance of the title of Mary Queen of Scots by force was an evident purpose to deprive and depose Elizabeth. "And how could that have been done without compassing her highness's death and destruction? for the jealousy of an usurper cannot suffer the just prince to live."

From this period downward the doctrine has become a principle of our law ; and Blackstone states it with seeming approbation, citing the well-known reflection of Machiavel, that "there is generally but a short interval between the prisons and the graves of kings." Here again the error consists in making consequences the test ; and Mr. Hallam's objection is unanswerable—that "it seems not very reasonable to found a capital conviction on this sententious remark ; and that it is not by any means true that a design against a king's life is necessarily to be inferred from the attempt to get possession of his person."

"Another still more remarkable enlargement of this clause of the Statute of Treasons (says the Commissioners) is the construction that insurrections of a domestic nature, or hostile conspiracies with foreign powers, where, though the alteration of the constitution and government may be intended, an attack upon the person of the sovereign is not in any degree or manner contemplated by the insurgents, constitute overt acts of compassing the king's death. Thus, in 1663, a consultation at Farley-wood, in Yorkshire, to effect a rising against the government, was held to be an overt act of compassing the king's death ; and in Queen Elizabeth's time, Doctor Stone, who had conspired abroad with a foreign prince to invade this realm, was held to be guilty of high treason in the article of compassing the queen's death.

"These ample extensions of the literal meaning of the provision of the Statute of Treasons against compassing the king's death are unquestioned law at the present day, being not only established by the ancient precedents above referred to, but confirmed by the authority of Mr. Justice Forster and the best modern text writers, and approved by judicial decisions and declarations in recent times. On the trial of Hardy, in 1794, Chief Justice Eyre says, 'the conspiracy to depose the king is evidence of compassing and imagining the death of the king, conclusive in its nature ; so conclusive, that it is become a presumption of law ; which is, in truth, nothing more than a necessary and violent presumption of fact, admitting of no contradiction.' And the learned judge then goes on to say that 'it was impossible for the counsel for the prisoner to maintain that an honest man could fairly doubt

whether he who conspires to depose the king has compassed or imagined his death.' The same learned judge repeats this proposition on the subsequent trial of Horne Tooke, in terms equally decided and emphatic. A comparison of this positive judicial opinion with the doubt expressed by Chief Justice Brooke, 150 years before, and in times of high prerogative doctrines, exhibits in a striking point of view the advance of artificial reasoning upon the terms of the statute, notwithstanding the general improvement of our criminal law, which had taken place in the course of that period. The second constructive interpretation to which we have above alluded, is likewise distinctly adopted by Chief Justice Eyre, in his charge to the grand jury, previously to Hardy's trial; on which occasion he says that, 'in a design to subvert the constitution, the compassing and imagining the death of the king is involved, and is in truth of its very essence.'

"Long after these constructions of the Statute of Treasons had been firmly established, in the criminal law, the statute of the 36th of King George III. c. 7, was passed, which superseded the necessity of resorting to them by making direct provisions respecting the several points of which they are composed. By that statute, which, though originally in force for the life of King George III. only, was made perpetual by the statute 57th King George III. c. 6, it is enacted that 'if any person shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of the king, or to deprive or depose him from the style, honour, or kingly name of the imperial crown of this realm, or of any other of his majesty's dominions or countries, or to levy war against his majesty within this realm, in order by force or constraint to compel him to change his measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, both Houses or either House of Parliament, or to move or stir any foreigner or stranger with force to invade this realm or any other his majesty's dominions or countries under the obeisance of his majesty; and such compassings, imaginations, inventions, devices, and intentions, or any of them, shall express, utter, or declare, by publishing any print-

ing or writing, or by any overt act or deed ; every such offender, being legally convicted upon the oath of two lawful and credible witnesses, shall be adjudged a traitor, and suffer as in cases of high treason.'

" It will be seen that this statute (as Lord Ellenborough observed on Watson's trial in 1817) ' did not so much introduce any new treasons, as declare to be substantive treasons those acts which had been, by successive constructions of the Statute of Treasons, determined to be the strongest and most pregnant overt acts of the several treasons specified in that statute.' It might have been supposed that this explicit declaration of the law would have put an end to the practice of resorting to those artificial constructions of the statute of King Edward III., which could only be justified or excused, as extensions of a penal law, by the omission of the ancient statute to provide for such cases. For some reason, however, which we do not comprehend, it has been the practice, ever since the passing of the statute of the 36th of King George III., in all prosecutions for high treason where the facts seemed to admit of it, to insert counts upon the Statute of Treasons in the indictments founded entirely upon these forced interpretations of that law. This practice was adopted on the trial of Watson for high treason in 1817, and the insertion of counts in the indictment to meet these constructive charges was expressly approved by Lord Ellenborough, by whom the doctrine itself was explained and enforced in summing up the evidence in that case to the jury. It was also adopted in the case of Thistlewood and others, who were tried and executed for high treason in 1820 ; and on that occasion likewise Lord Tenterden (then Lord Chief Justice Abbott) explained and justified the doctrine of constructive compassing the king's death, though he directed the attention of the jury more particularly to that part of the charge which was founded upon the direct enactments of the modern statute."

This perseverance in an obvious error is the more inexcusable as it had been pointed out and made the occasion of some severe reflections by Hume :

" The lawyers had used the same freedom, though perhaps after a more exceptionable manner, with the law of Edward the Third.

They had observed, that, by that famous statute, if a man should enter into a conspiracy for a rebellion, should even fix a correspondence with foreign powers for that purpose, should provide arms and money, yet, if he was detected and no rebellion ensued, he could not be tried for treason. To prevent this inconvenience, as they esteemed it, they had commonly laid their indictment for intending the death of the king, and had produced the intention of a rebellion as a proof of that other intention. But though this form of indictment and trial was very frequent, and many criminals had received sentence upon it, it was considered as irregular, and was plainly confounding, by a sophism, two species of treasons, which the statute had most accurately distinguished. What made this refinement the more inexcusable; a law had passed soon after the restoration, where the consulting or intending a rebellion, was, during Charles's lifetime, declared treason; and it was required that the prosecution should be made within six months after the crime was committed. But notwithstanding this statute, the lawyers had persevered, as they still do persevere, in the old form of indictment; and both Sir Harry Vane and Oliver Plunkett, titular primate of Ireland, had been tried by it. Such was the general horror entertained against the old republicans and the popish conspirators, that no one had murmured against this interpretation of the statute; and the lawyers thought, that they might follow the precedent even in the case of the popular and beloved Lord Russel. Russel's crime fell plainly under the statute of Charles the Second; but the facts sworn to by Rumsey and Shepard were without the six months required by law, and to the other facts Howard was a single witness. To make the indictment, therefore, more extensive, the intention of murdering the king was comprehended in it; and for proof of this intention the conspiracy for raising a rebellion was assigned, and what seemed to bring the matter still nearer, the design of attacking the king's guards.

"Russel perceived this irregularity, and desired to have the point argued by counsel: the chief justice told him, that that privilege could not be granted, unless he previously confessed the facts charged upon him."—*Hume's History of England.*

The law of treason rejects the distinction between accessaries before the fact and principals. No inconvenience or hardship has resulted, and the Commissioners conceive this to afford a fair inference against the general utility of the distinction. But do not crimes mainly consisting in intention stand on a different footing in this respect?

The remainder of this section is devoted—to Offences against the state inferior to Treason, Misprisions, Contempts against the King's Courts, Offences against the Royal Prerogative, &c. There is a passage under this last head which may be deemed worthy of attention at the present time, when British soldiers are fast falling into the fashion of the Swiss :

“ Mr. Serjeant Hawkins says, ‘ it is so high an offence to prefer the interest of a foreign prince to that of our own, that it is criminal to do anything which may but incline a man so to do,—as to receive a pension from a foreign prince without leave of our king.’ This learned writer gives, indeed, no authority for such a proposition, but his reference to a former chapter, in which the statutes against foreign enlistment and acting under foreign military commissions are discussed, seems to show that, in his opinion, it is only by analogy to those laws, that such an act would be criminal. At all events, we are not aware that this rule, as laid down by Mr. Serjeant Hawkins, has received any judicial sanction. As those services to foreign powers which tend to compromise or prejudice the safety of the crown or the interests of the public, are now provided against by special enactments, we do not conceive that any inconvenience can result from the omission in the digest of any provision under this head.”

The doctrine of contempt against the king's person or government has been curiously extended occasionally :

“ For the purpose of illustration we refer to the following instances. Such contempt may consist in ‘ The doing an act which impliedly encourages rebellion ; as by absolving persons at the gallows, who being condemned for high treason show no signs of repentance, but persist in justifying the fact, or by drinking to the pious memory of a person executed for high treason.

“ ‘ Also it is said to be an offence (i. e. a contempt of the king's person or government) for which a man may be indicted, to refuse in a foreign port to pay the usual customs, because it may cause a breach between our king and the king of the country.’ ”

Defamatory publications against foreign princes are obviously within the principle ; and the propriety of punishing them is maintained in the Report.

The Prefatory Remarks on these heads are succeeded by the proposed Digest. The following Articles relate to the levying of war :

"ART. 11.—The terms 'levying war,' contained in Article 1, as regards the manner of it, may consist not only in the assembling of men armed and arrayed in a warlike manner, the enlisting, drilling or marching of men, the using drums, colours, or any other of the ordinary pageantry, ensigns, or outward circumstances indicative of war, but also in any rising or assembling of people whether armed and arrayed in a warlike manner or not, in order, by dint of numbers or superior force, to execute such treasonable purpose as is hereinafter specified.

"ART. 12.—A levying of war shall be deemed to be a levying of war against the King where it is levied against the person of the King, or against any army or force appointed by him, in opposition to his authority, or with intent to do him any bodily harm, or impose any restraint upon his person, or to depose him, or to dispossess or deprive him of any portion of his dominions or regal authority, or with intent by force or constraint to compel him to change his measures or counsels, or to put any force or constraint upon, or to intimidate or overawe both Houses or either House of Parliament.

"ART. 13.—Provided that no assembling or rising of people shall, by reason of any illegality or generality of purpose, be deemed to amount to a levying of war against the King, unless such assembling or rising be with one or other of the several intentions specified in the last preceding Article."

Insurrections to pull down inclosures &c., however general the purpose, would consequently be no longer punishable like insurrections against the crown.

The object of the following articles is to remove the existing doubts regarding overt acts.

"ART. 17.—The terms 'open deed,' and 'overt act or deed,' as used in Article 1, and elsewhere under this head, shall be deemed to include any act of conspiring, or conferring or consulting with, or advising, persuading, counselling, commanding, or inciting any person, or any other act, measures or means whatsoever, done, taken, used, or assented to, towards and for the purpose of effecting the traitorous intention or act charged.

"ART. 18.—An act laid to be an overt act done for the effecting any alleged treason shall not be deemed to be insufficient to support

the charge, by reason that such act either constitutes or may properly be alleged to be an overt act of any other kind or branch of treason; provided it be in its nature and circumstances a sufficient overt act to support the charge of treason so alleged.

"ART. 19.—Words spoken shall not be deemed to constitute an overt act of any treason, unless they be words of advice, direction, or persuasion tending to effectuate some traitorous act or design; provided that nothing in this Article contained shall be deemed applicable to any consultation for any traitorous purpose.

"ART. 20.—No writing which shall not have been published in contemplation or prosecution of some traitorous act or design shall be deemed to be an overt act of treason.

"ART. 21. Provided that where the overt act or overt acts of compassing or imagining the death of the King shall be the assassination or killing of the King, or any direct attempt against his life, or against his person, whereby his life may be endangered, or his person may suffer bodily harm, the person or persons charged with such offence shall be indicted, arraigned, tried, and attainted, in the same manner, and according to the same course and order of trial in every respect, and upon the like evidence, as if such person or persons stood charged with murder, but upon conviction shall incur the penalties of the class."

Dating from the accession of Queen Elizabeth, statutes have been passed occasionally for the protection of the Protestant establishments, denouncing all attempts on the part of Jesuits, seminary priests &c., to re-establish the Papal supremacy in this country, as treason or misprision of treason. "We have experienced" (say the Commissioners) "great difficulty in determining what would be the proper course for us to adopt with respect to these laws. It would be foreign to our object to discuss the policy and justice of passing these Acts in the reigns of Queen Elizabeth and King James I.; it is obvious, however, that they arose from emergencies peculiar to the periods in which they were enacted, and we think it is probable that if legislation were now to be applied to subjects of this nature for the first time, such laws as those which we have just noticed would not be enacted. The attention of Parliament has been called to these enactments on many occasions during the last century; but although extensive relief has been given to Roman Catholics by several statutes, and particularly by the statute of the 31st of King

George III. c. 32 (the Roman Catholic Toleration Act) and the statute of the 10th of King George IV. c. 7 (the Roman Catholic Relief Act), the Legislature has expressly refused to repeal the restrictive laws, and has confined the measure of relief to the exemption of Roman Catholics from the penal consequences of a transgression of the ancient statutes upon taking certain oaths and making certain declarations.

“ The general policy of the Legislature appears to have been, on the one hand, to accept the conscientious obligation incurred by Roman Catholics on taking the oaths as a sufficient security for the State ; and, on the other hand, to insist that the ancient penal statutes shall remain in force, as constituting a kind of compulsion to take the oaths ;—so that, at all events, the State should be provided with the security either of the oaths, or of the penal laws.

“ The improvement of the penal laws against the Roman Catholics involves purely political considerations, which are exclusively for the determination of the Legislature ; it appears to us that we should not be justified, in the discharge of our duties under your Majesty’s Commission, in attempting to discuss them. Indeed it would be impossible for us to suggest any means by which these laws could be improved, without opening a great national question of much delicacy and difficulty which has already been solemnly settled by the Legislature. We are, however, deeply impressed with the opinion that the whole branch of the Criminal Law relating to offences arising out of the exercise of the Roman Catholic religion requires revision.

“ With this view of the subject, we have not reduced the laws relating to treasons connected with the exercise of the Roman Catholic religion into the form of Articles in our Digest ; but have merely given the words of the statutes in order that they may be placed before the Legislature in a connected form.”

The statutes in question are 1 Eliz. c. 1 ; 5 Eliz. c. 1 ; 13 Eliz. c. 2 ; 23 Eliz. c. 1 ; 27 Eliz. c. 2 ; and 3 Jas. 1, c. 4.

The next and the most important subject discussed in this Report is Libel in all its branches, personal and political. It has evidently occupied a great deal of the time and attention of the Commissioners, but the result is far from satisfactory ;

and we suspect that instead of making up their minds in conclave and leaving their joint conclusions to be expressed by one of their number, each in turn has been entrusted with the pen. At all events the prefatory remarks are sadly tautological, and no such thing as a connected train of reasoning is to be found in them. There is also one all-pervading error,—the same, by the way, which we pointed out some time since in the Preliminary Discourse to Mr. Starkie's Treatise.¹ The legal fiction, that libels are breaches of the peace, is gravely adopted and frequently referred to as a fact; though the slightest consideration might have suggested that a libel is a breach of the peace, just as picking a pocket is a breach of the peace. Either may lead to an affray or disturbance; yet they are punished not so much on account of their tendency to produce this effect, as because it is for the welfare of society that character and property should be respected. How else is the distinction between oral and written slander to be justified? You may utter the most opprobrious expressions to a man's face, so long as they do not impute an indictable offence, with impunity; but if, being five hundred miles distant, you print or write and publish anything calculated to expose him to contempt, you are liable to an indictment for so doing.² Is this because the slandered party in the latter case is more likely to inflict a summary vengeance on the calumniator? If not, surely libels of all sorts may be discussed with reference to general considerations of expediency; with the single exception of those partaking of the nature of a challenge or direct provocation, which the

¹ 11 Law Mag. 439.

² "Every person acquainted with the law knows, that whereas spoken slander, especially if spoken before a number of persons, may not only be as bad as written and published slander, but may be worse, inasmuch as every person can hear and understand, though many persons may not be able or likely to read a line, yet, in order to make that slander actionable, it must be of one particular description of slander, namely, imputing an indictable offence; and this restriction leaves out a great number of the most bitter slanders, as, for instance, calling a man a rogue, a coward, a knave, an apostate, a profligate, a seducer, an adulterer, all of which is highly defamatory, yet not actionable; but if the twentieth part of this,—such is the inconsistency of the law,—if the twentieth part of these things be put in writing, though it is not read by more than a single person, that is an act of publication, and an action lies for the libel."—(*Lord Brougham's Evidence before the Select Committee in 1834.*)

Commissioners are quite welcome to refer to their favourite fiction, if it so pleases them. The extent to which they have been misled by it will sufficiently appear from a brief analysis of their Prefatory Remarks. They begin thus :

“ Libels and other illegal communications form a large and important class of offences distinguishable from all others by plain characteristics. They consist simply in some expression of facts or opinions, tending to some public or private grievance, and proceeding from a malicious intention to injure, or from such a culpable disregard of consequences as is usually termed implied malice.

“ The laws relating to this class of offences are necessarily of great importance to the public ; not only because they concern the ordinary and daily intercourse of society in all its varied transactions, but also on account of the great influence such communications, especially those made through the medium of the press, necessarily have upon every subject of public or private interest.

“ Whilst the law of libel is one of the most important parts of penal legislation, it is also perhaps one of the most difficult, in consequence of the conflicting interests which must be adjusted before its legitimate objects can be attained. To reconcile freedom of writing with the right of all men of unblemished character to keep inviolate the esteem and consideration of their fellow-men,—to secure the character of citizens from malicious calumny, and at the same time to respect the right of every man to express the truth when he does so without hatred or malice,—to induce individuals to refer the cognizance and reparation of injuries and insults committed against them to the law, instead of making themselves the avengers of attacks upon their characters,—the attainment of all these ends is the proper object of the penal law respecting libel ; and the discovery of the best means of attaining them constitutes a problem which has been found to be extremely difficult of solution, in all civilized countries where attempts have been made to legislate upon the subject.

“ It is with great diffidence that, in the necessary prosecution of the duty confided to us, we observe and suggest alterations upon a branch of the law of such paramount importance and difficulty ; the more especially because it is one

upon which popular opinion has been in some degree opposed to the existing law, and one which has already been frequently discussed in Parliament. We cannot also but observe that mere penal restraints, such as ought to regulate communications by writing or printing generally, form but a portion of a system of rules calculated to secure the liberty of the press, and at the same time to prevent its abuses ; objects which cannot possibly be well and effectually framed independently of each other, or otherwise than as parts of a general and uniform scheme, which embraces the subject in all its relations, whether they be simply restrictive, remedial, or penal.

“ Under these impressions we propose, in conformity with our course of proceeding on other occasions, to state the principles on which this branch of the criminal law depends ; to refer to such rules of the law of England as are necessary with a view to the suggestions afterwards made ; and lastly, to make some suggestions concerning the rules of the present law, which appears to be susceptible of improvement.

“ In order to attain to satisfactory conclusions on a subject which has given rise to much conflict of opinion, it is desirable to divest it of all extrinsic considerations, and to reduce it, for the purpose of minute examination, into its simple elements.

“ A man’s thoughts, as regards penal consequences, are free,” &c.

It is unnecessary to follow them any further ; and their general remarks on the expediency of prohibiting malevolent attempts to bring the government and the constitution into discredit, or to undermine religion and morality, though well-expressed, contain little or nothing possessing the attraction of novelty.

The limits (they go on to say) which may be conveniently adopted with reference to this class of offences must depend either, 1st. On the nature, quality, and consequences of the communication ; 2ndly. The act of the party making it, and the means of communication used ; 3dly. On his motive in doing the act, either simply, or in reference to the occasion of doing the act, or the circumstances under which it was done.

Under the first head, they consider the kind of mischievous

quality required to make a publication libellous, the possibility of defining libels, and the materiality of the truth or falsity (to use their own somewhat affected term) of the charge.

As to the kind of mischievous quality—it is simply requisite that the publication should have a tendency to produce mischief to the public or to a private person, not that any mischief should actually be produced. If, for example, an individual were to put forth an address inciting a discontented populace to burn all stacks of corn within a particular district, the offence would be complete though no injury ensued; and in the same manner it is inferred that libels on private persons of the sort falling within the cognizance of the criminal courts, are necessarily of an injurious tendency. The reasonableness of this rule does not appear to have been disputed in any quarter; but many superficial objectors have complained that the law is too vague in not defining what constitutes a libel. When Lord Brougham was examined before the Select Committee of the House of Commons, his opinion was asked as to the possibility of defining a libel, and he replied :

“ I hold it to be hardly possible to define libels by which guilt may be incurred as tending to a breach of the peace, other proceedings of a violent nature, to shaking the institutions of the country from the sovereign downwards, and loosening the foundations of society, and to a variety of other heads, under which may be classed, though without any distinctness of definition or anything like exhaustion of the subject, the offences that are committed by publishing or uttering libellous or seditious expressions. Any definitions that I have ever seen given had one or other of two faults equally opposed to the requisites of a logical definition; they were either so vague and general as not to specify or define anything, or, if they did not sin in that respect, they were only rendered particular and definite by omitting some species of libel or of sedition, which on the most cursory inspection ought manifestly to have been comprehended. A definition, in order to satisfy the requisites of a good logical definition, ought not only to be sufficiently precise so that it shall take in nothing except what was intended to be specified, but also sufficiently comprehensive, to omit nothing which ought to be included. I have never yet seen, nor been able myself to hit upon anything like a definition of libel, or even of sedition, which possessed those requisites of a definition; and I cannot help

thinking that the difficulty is not accidental, but essentially inherent in the nature of the subject-matter. If any definition were mentioned to me I should state in what light it struck me, and wherein I deemed it defective. I have frequently heard it said that *libel* means nothing, for that the word signifies a *little book*. This was a very favourite mode of arguing of the late Mr. Horne Tooke, and has been adopted by some of his followers; Mr. Tooke being a great master of etymology, and having made what may be called important discoveries in that science, and in the philosophy of grammar, was not unnaturally in the habit of considering everything in an etymological point of view. But when he and his followers said a libel means a little book, they forgot that the origin of most of the words which convey perfectly definite ideas was etymologically as little calculated to convey an accurate description of the thing signified as the word *libel* describes what we mean by that word. A person might as well say there is no such thing as the crime of forgery, because to forge is to beat iron into a form when it is red hot, as that the word *libel* is not intelligible, and does not designate a composition of a known description. Moreover, when men speak of libel as a little book, they either do not deal fairly or they do not deal learnedly with the subject, even as etymologists; for, independently of the observation I have last made, no one, except elliptically, ever made use of the word *libel* as a literal translation of the Latin. If a boy at school were to be called upon by his master to translate *libel*, and should translate it as this argument assumes upon the surface merely, '*libellus*,' he would probably be punished, and certainly might justly be corrected; for the Latin of *libel* is not *libellus*, but *libellus famosus*, and that is the civil law designation, and indeed there is a title in the Pandects, '*De injuriis et famosis libellis*.' *Libel* then means in its original, not little book, but a 'defamatory little book.' Now it may be true that 'little book' means nothing criminal; but surely defamation, a taking away men's character, does convey the precise idea of some offence, though it must be admitted that in this as in almost every other case the sense of the primitive word has been so stretched as to comprehend other things. For these reasons I am not of opinion that any stress ought to be laid in the discussion of this question on the etymology of the word *libel*. It is an offence unfortunately of a somewhat vague description, but sufficiently known in law, and perhaps as well defined as assault and some others; and I do not believe, from all the experience I have had in courts or in consultations, that in practice any considerable difficulty is felt on account of its indistinctness. I have never known a

case in which a party was oppressed or a jury misled, by the vagueness of the term or the want of a definition. I do not remember a case in which the jury did not form almost as accurate a notion of what was meant by the offence of libel as of most other offences, especially in the class of misdemeanors. Certainly if we are to argue on the etymology of libel as telling nothing, the same may be said of sedition, which is nevertheless supposed to be more distinctly understood. That term, however, if we apply the etymological test, means going apart, *seorsum itio*; and it comes from the Roman people rising against their chiefs and going to a certain place. Yet every body knows what sedition is; no one, I believe, says that it is an offence which cannot be understood so as to be dealt with."

The Commissioners adopt pretty nearly the same mode of reasoning. Modes of expression are far too variable, fleeting, and evanescent to be anticipated or subjected to rule, and a law forbidding specific forms of speech might always be evaded with facility. "Such offences, in truth, admit of no sufficient description, except in respect of the *effects* which they produce, or which they immediately *tend to produce*. Any attempt to enumerate, with a view to express and prohibit all the offensive means by which an ill-disposed person might attempt to destroy the public sense of modesty and decency, would be impracticable and absurd; if it be necessary that such practices should be restrained by the municipal law, it is, if not impossible, at least difficult, that the offence should otherwise be described than generally by a prohibition to publish that which, being immodest and indecent, directly tends to corrupt and vitiate the morals of the public. It may be objected, that any such general description is uncertain and indefinite. Admitting this to be so, no other inference seems to result than that human laws do not admit of perfection, and that no general definition can be framed which shall be applicable, with absolute certainty, to acts capable of infinite variety."

The remarks on "the truth or falsity of the communication" succeed, or rather the first division of them, for the subject is dropped and resumed in a manner which is far from adding to the force or clearness of the argument. In this place, our attention is called (and called in so many shapes that it cannot well fail to be indelibly impressed upon

the memory) to the distinction between libels as they affect the public, and libels as they affect the individual attacked :

“ With a view to the preservation of the public peace it cannot be very material whether the personal imputation be true or false ; ill-blood and a thirst for vengeance may be excited by a publication of that which is true as well as of that which is false, according to the common adage, ‘ the greater the truth the greater the libel,’ or in other words, where the imputation is just, the more likely may the party be to resort to retaliation by force, and thus disturb the peace. It is therefore obvious that it would be contrary to the principle of a law devised for the preservation of the public peace, to limit its operation to the publication of merely false imputations. If, on the other hand, it should be deemed to be just and expedient that the penal law should in principle extend to the protection of private character from aggression, it becomes most important to consider whether that protection ought not to be confined to false imputations. The injuries to be provided against in the two cases are perfectly distinct in their nature; in the one case the injury is done to society by endangering the public peace, in the other it is done to the individual as tending to deprive him of that which he has a right to enjoy,—in which latter case, although the injury be of a private nature as affects the individual sufferer, it may yet be properly the subject of penal cognizance on the same principle of necessity or convenience which visits the spoliation of private property as a public offence.”

If this principle had been followed up, and adopted as the criterion, it would have effected a marked improvement in the argument, which we hardly know how to deal with as it stands. It is too long to quote, and too confused to analyze. The root of the matter, however, appears to lie in the following passages :

“ Open, malicious, and unnecessary imputations, though true, are properly of criminal cognizance, because, notwithstanding their truth, they still tend to the disturbance of the peace; but, as regards the principle of merely preserving the public peace, the truth or falsity of the matter published being indifferent, and not a ground of justification or even of extenuation, it is obvious that, to be consistent, the principle ought to prevail throughout, and that, if by virtue of such considerations

the evidence of the truth were to be entirely excluded, no higher penalty ought to be inflicted than should be inflicted in case the imputation were true,—to inflict any higher would be not merely to give weight to a bare assumption, it would be unjust in the extreme to punish a party as for a false statement, without allowing him to prove it to be true.

“From such considerations we think that the following conclusions may properly be deduced : That in reference to one principal object in restraining defamatory communications, viz., the preservation of the public peace, the rule may with perfect consistency and correctness be adopted, that the truth or falsity of the statement shall be deemed to be indifferent, punishment being inflicted in respect of the mischief and danger to the public peace, and that only. But that if the law also interferes, as we think it ought, on a distinct ground, viz., for protecting private reputation from defamatory injuries, then it would be inconsistent with the principle thus adopted to regard the truth or falsity of the statement as indifferent : for upon that question must the right to expect protection from the criminal law, as well as the right to a remedy in damages, essentially depend. For these reasons we also conclude that the offence, as regards the public, ought to be regarded as distinct from that which concerns the injury to private reputation ; and the treating them in this manner would, we think, tend to remove difficulties and anomalies with which the English law of libel is at present encumbered.”

We hope these conclusions are satisfactory to our readers. We cannot say that they have proved so to us ; and the Commissioners themselves appear to have some misgivings as to their lucidity, for they directly afterwards slide into the topic again :

“It may perhaps be objected, that were a defamatory communication to be made penal, not strictly on the narrow principle of protection to the public peace, but on the more extensive one of protection to private reputation for reputation's sake, the consequence would be that an indefinite multitude of offences against morality, of which the penal law takes no direct cognizance, would thus indirectly become subject to legal investigation.

“This objection, however, would apply also to the case of

an action to recover damages. And although, as long as the principle of penal restraint was simply the preservation of the public peace, there would be no inconsistency in excluding all consideration of the truth or falsity of the offensive statement, yet if the law recognized the principle of protection to private reputation, independently of that of danger to the public peace, the necessary consequence would be the regarding the falsity of the charge as of the essence of the wrong, just as much in the criminal as in the civil proceeding by one who complained of *injury* done to his reputation. The question, therefore, really resolves itself into this, whether the law ought to recognize the injury to private reputation by a false and malicious calumny as a substantive offence, or as an aggravation of the offence committed by endangering the public peace.

“By way of illustration of the preceding observations, let it be supposed that A., a tradesman, indicts B., another tradesman, for having published in a newspaper that he, A., was a swindler, and that he endeavoured to defraud, by means specified in the libel. As the law stands, on not guilty being pleaded by B., the sole question would be, whether B. had in fact published the libel; he would not be allowed, for any purpose, to prove that what he so published was true. A., on the other hand, would be excluded from evidence to show that the imputation contained in the libel was false. And the publication having been proved, B. would be found guilty, and would not be permitted to show, by affidavit or otherwise in mitigation, that the charge in the libel was true. Under these circumstances it is presumed that the punishment would be regulated by the principal of danger to the public peace resulting from the provocation offered to A. to break the peace in revenge for the imputation on his character, (the truth or falsity of that imputation being wholly indifferent,) and consequently that no greater punishment could properly be inflicted than would have been inflicted, had it been admitted or proved that the imputation was true. To inflict any greater punishment upon the presumption of the charge being false, or on a mere speculation of its being false, when B. was ready to prove the contrary, would be opposed to every man's common sense of justice. B. then would be liable to such punishment as such a provocation to a breach of the peace might deserve, assuming the charge to be true, and to no greater.”

Now everybody knows that if B.'s punishment were regulated by the amount of danger to the public peace, it would probably be far slighter than he deserved. It would in point of fact be regulated by much more extended considerations, and it is perfectly surprising that the Commissioners should persist in reverting to this paltry fiction, when the true principle would be just as favourable to their views. In the next paragraph, they allege a sufficient reason for making the calumniator liable criminally as well as civilly. He may be a pauper, or a very rich man, in either of which contingencies no adequate remedy would be afforded by an action. But it is for the good of society that libels should be effectually prohibited. Here therefore is ample ground for making them the subject of penal restraint, independently of the preservation of the peace.

2. As to the act and mode of publication. The mode of publication, it is said, can be material only as regards the extent of the mischief; but this is the very thing which ought to sway the determinations of the legislator. If the mischief be small, the prohibition might prove impolitic, as there are few restraints on conduct which are not attended with inconvenience at the best. Thus we find the Commissioners remarking :

“ There is, no doubt, a marked distinction between oral and written communications, both as regards in ordinary cases the mind and intention of the publisher and the effect of the thing published.

“ The committing of injurious and defamatory matter to writing evinces a more determined and deliberate purpose than is ordinarily to be inferred from mere words spoken. Communications by writing are, therefore, likely to make stronger impressions than such as are merely oral. They are permanent, and capable of wider diffusion. Such qualities and consequences are, however, dependent on circumstances, which may in particular cases invert the mischief likely to arise from a publication of the very same matter; as where a libel is published but to one person, and the same slander is spoken in the hearing of a large assembly, the oral may frequently be more mischievous in every respect than the written communication. Each mode of publication may, in truth, be

more pernicious than the other, when the comparison is made in respect of different injurious consequences. Slandorous and abusive language may be much more likely to provoke the party to whom it is applied when spoken in the presence of many others than if addressed to him by letter, where an interval was allowed for the subsidence of sudden resentment. Publications of an impious or indecent character are rendered more mischievous, and are published with greater security to the offender, when they are diffused through the medium of the press, than they could possibly be made by mere oral communication.

“ The defining the particular species or quality of those communications to which such a restraint ought to be applied must depend on the greater or less degree of inconvenience which would result from the absence of such a limit. Thus assuming, for the sake of illustration, that any written communication, the effect of which was to render another person odious or contemptible, was properly constituted a crime, little doubt can be entertained that, were the law to be extended indefinitely to all oral communications, the consequence would be highly inconvenient, in fettering ordinary conversation affecting the characters of individuals, and in greatly multiplying occasions for frivolous and vexatious prosecutions.

“ On the other hand, a law which, with a view to the public peace, merely prohibited written insult, would be incommensurate with its object, viz. the preservation of the peace, which is quite as likely to be broken in consequence of an oral as of a written insult.”

We should say “ much more likely ;” and this shows that the main object of the penal law against libels is not the preservation of the peace in the limited acceptation of the term.

The law of England is described as neither clear nor consistent upon the point,—whether the mere act of composing and writing noxious and injurious matter with a view to publication, be a punishable offence. The Commissioners give no opinion regarding the question of positive law, but think that, to deal with unpublished writings as libels, would be attended with more evil than advantage to the community.

In reference to intention, libels are divided into three classes:—

“The first comprises, those where the intention must be regarded as immaterial.

“The second, those where the offence depends upon the real motive of the offender, and where it lies on the prosecutor to prove actual malice.

“The third, those where an evil motive is to be presumed from a noxious act unexplained, and where it lies on the party charged to rebut the implication of malice.”

The statements of judges and witnesses are given as examples of the first class. The second comprises what are ordinarily termed privileged communications, as in giving the character of a servant. The third is described as taking in all which do not fall within the first and second; but if this be so, we do not exactly see how the second member of the sentence “and where it lies on the party charged to rebut the implication of malice,” is to be applied; for it is seldom open to the party to rebut the legal presumption. Indeed, it is expressly stated in the Report, that the real motive and intention must be disregarded in most cases. “To hold that a man should be absolved from penal responsibility, merely because his motives were benevolent, would be to set private opinion above the law.”

In this place the Commissioners advert to the existing condition of the law.

“We now advert to some of the provisions of the law of England relating to this subject, so far as may be necessary to illustrate the remarks which we propose to add, and to elucidate and justify the enactments which we shall afterwards submit. In adverting to the law of England, we refer to an observation already made, that we labour under some difficulty from being confined to a very narrow and partial view of the general policy of the law concerning libels and other illegal communications. We may add, that the provisions of the Criminal Law of England regarding these offences are much less artificial, and far less perfect than those which regulate the remedial branch of the law in respect of oral slanders. Whilst the latter are now moulded on sound principles to meet the exigencies of society, and rules have

been at last established upon a beneficial adjustment of conflicting principles, the few provisions which concern criminal liability remain for the most part in their ancient inartificial state. It is not difficult to account for this state of things. With respect to slander, as the subject of a civil remedy, the frequency of suits induced the necessity of continual discussion on the subject, and the natural result has been, that by slow degrees, and after great fluctuations and the lapse of many centuries, many rules and distinctions have been established conducive to practical convenience, and the law presents a more systematic form than might have been expected. In respect of the criminal branch the case has been widely different. The law in its ancient simplicity contained few regulations in the way of criminal restraint; many were not essential when few could write, and none as yet could print. The wider diffusion of the first rudiments of education among ranks to which learning was before unknown, the invention of the press, and the sweeping away of those restrictions by which its action was first fettered, are circumstances from which material changes in the criminal branch of the law might have been expected to result. Such, however, has not been the consequence, and the simple principle of penal restraint in respect of defamatory injuries, and the law by which they are prohibited, remains, with slight exception, what it was many centuries ago."

Though their remedial power may be restricted, we do not exactly understand how they can complain of being confined to a meagre, partial, and narrow view of a subject so elaborately discussed.

After quoting Blackstone and Hawkins, who both refer the penal provisions of the law of libel to the fiction before mentioned, they proceed:

"It has appeared to us, after attentive consideration, that the law of England, in thus making the criminal branch of the offence to depend on the tendency of the libel to provoke to a breach of the peace, is constructed on too narrow a basis. And we apprehend that some incongruities which are to be found in the practical application of this branch of the law, are attributable to this defect.

"Although it be true that the danger to the public peace

is one ground for penal restraint, it is not, we think, an exclusive one. The injury to private reputation is beyond all doubt a sufficient ground of legal interposition for the protection of reputation, by giving a remedy in damages; and there seems to be no satisfactory reason why that protection should be so limited to civil reparation any more than there is in the case of mere spoliation of property. The law which gives a remedy in damages in respect of trespass to property, is confessedly insufficient for the protection of proprietors against the fraudulent abstraction of property; and in many instances severe penal restraints against malicious destruction or damage are deemed to be necessary to the extent even of subjecting offenders to the penalty of transportation. Although it be not necessary to punish a malicious libeller in respect of the destruction of private reputation with so much severity, the law might justly be regarded as inconsistent and defective which thus carefully protected property, but afforded no more than the mere civil remedy in respect of wilful injuries to reputation. In the former case the injury is made penal, simply because the giving a remedy by action affords no adequate protection against injuries of a fraudulent or malicious nature, perpetrated, it may be, by offenders unknown, or where known, irresponsible through poverty or other circumstances. But precisely the same reason, viz. the inadequacy of the civil remedy, suggests the expediency of also affording protection to private reputation by the like means against malicious attacks so easily and frequently made by otherwise irresponsible authors.

“The law of England does not, however, recognize the injury to the private right of reputation as a ground of penal restraint, but founds its prohibitions and penalties mainly, if not wholly, on the ground of protection to the public peace against those interruptions which injuries to reputation are so likely to occasion. It will be seen, from the definitions of the offence, and the authorities referred to, that this is the great, we may almost state the exclusive principle of the criminal law of libel. One important and direct consequence from the adoption of so narrow a principle is, that the truth or falsity of the matter published becomes wholly immaterial. This in itself is a perfectly just deduction from the original principle. For, as a violation of the peace is as

likely to result from a publication of that which is true as that which is false, to a law designed for effectuating that principle, the truth or falsity of the matter published must be indifferent.

“Conformably with this inference the law of England excludes both parties, the prosecutor as well as the defendant, on a charge of personal libel, from adducing any evidence as to the falsity or truth of the charge. And in reference to the same principle, a defendant convicted of a personal libel is not permitted, even in mitigation of punishment, to show that what he published was true. This again is a just deduction from the original principle. It is however to be emphatically observed, that it is one which is subject to the condition that no greater degree of punishment is to be inflicted on a convicted party than ought to have been, or would have been inflicted on the supposition that the matter published was true. A punishment adapted to that supposition gives the defendant all the benefit which he could derive from actual proof. If, however, the punishment were not to be modified by that condition, if the rule were not strictly adhered to of punishing merely for the offence against the public peace, without regard to the truth or falsity of the matter published—that is, if the truth or falsity were to be regarded as material, the rule would be inconsistent with its principle, and highly unjust.”

This is a marked improvement on the preceding passages regarding the same topic; the pen has obviously changed hands, or the writer's thoughts have worked themselves clear, and he has only omitted to observe, that the practical influence of the fiction is by no means proportioned to the stress laid upon it by the text writers. Libels are now dealt with by the Courts more with reference to their noxious than their irritating quality; and a much severer punishment would be inflicted on the calumniator who had sought to undermine another's character by a quiet though venomous attack, than on one who made use of broad, undisguised, but unmeaning and aimless ribaldry. Moreover, the mode of proceeding by indictment is almost a dead letter, and the injured party almost invariably seeks redress by action,—when the truth is a complete bar, or by criminal information, which is never granted

without a denial of the injurious imputation upon oath. The doctrine of the preservation of the peace, therefore, may fairly be adduced to account for some existing anomalies, but surely not to found, justify, or even modify suggestions for a change. We shall presently see that the Commissioners propose legislating with express reference to it.

In considering the main question, the admissibility of evidence of the truth, it must constantly be kept in view that there are many cases of libel in which the question of malice depends almost exclusively upon the facts; as in the case mentioned by Lord Brougham, where the publisher of a newspaper was prosecuted by indictment, for having stated that a person teaching in a public institution had been convicted of forgery in France, and set to work in irons. Evidence of the conviction, &c. was tendered and refused; yet, without knowing the truth or falsehood of the charge, it would be hardly possible for judge or jury to declare, whether the publisher was actuated by the worst malice or the most laudable public spirit. It is quite clear, therefore, and admitted on all hands, that some alteration must take place, but opinions are much divided as to whether the truth should be allowed to operate as a positive and complete bar to the penal as well as to the civil remedy:

“The question how far the truth of a defamatory publication of a personal nature ought to be available to protect the publisher from legal consequences, is a subject upon which a great discrepancy of opinion has obtained amongst able lawyers, and concerning which the laws of different nations have established opposite rules. We therefore deem it right to make a few observations on the subject, so far as it relates to the distinctions which we propose to make, believing that although we may differ from many, for whose opinions we entertain great respect, in thinking that the rule of English law, as regards the action for damages, is founded on just principles, yet that even those who do not assent to this position, would approve of the distinction we propose to make in this branch of the criminal law. As regards civil actions for any slander or libel, it is an established rule of the law of England, that the truth of the matter complained of shall constitute an absolute and complete defence. The English

law in this respect differs from the laws of Scotland, France, and some other nations, which whilst they do not exclude a defence by establishing the *veritas convicii*, as it is termed in civil law, do not regard it as an absolute and peremptory defence, but only as a circumstance which may, subject to particular conditions, and in connexion with other circumstances, constitute a defence. Some to whose judgment much deference is due, are of opinion that although the truth of a publication should always be admissible for the purpose of enabling a jury to form a just estimate of the publisher's motives, the truth of the publication ought not to operate as a conclusive bar to a prosecution; and in this opinion we coincide so far as concerns any prosecution founded simply on the tendency of the publication to produce a breach of the public peace; for whether the statement be true or not, it ought not generally and without some special reason to be tolerated when it tends to the disturbance of the peace. Others, however, think it proper that the truth of the matter published ought not to constitute an absolute defence to a prosecution although it be founded simply on the principle of protection to private reputation, but only in the absence of express malice or under defined circumstances, which, co-operating with the truth, shall constitute a complete defence. This further limitation of the effect to be attributed to the proof of the truth of the alleged libel is, we think, subject to the following amongst other objections.

“First, that in such a case the benefit of protection to a wrong doer would be purchased at a certain public inconvenience by preventing the true characters of delinquents from being known; the effect of which would be to diminish the importance of reputation, and tend to place the profligate on a level in this respect with the most deserving. Secondly, that the proposition assumes that one really guilty of the delinquency imputed, and whose enjoyment of character rests simply upon other people's want of knowledge, has a legal claim to protection—a position which, for the reasons above stated, appears to us to be fallacious.”

In a former number we commented on a case adduced by Lord Cottenham, when Solicitor General, to exemplify the inconvenience of the libel law as regarded civil actions, and

consequently bearing against the argument of the Report. We will now give it in his own words :

“The transaction to which he was about to refer, occurred many years ago, but it had made a deep impression on his mind at the time, and, therefore, he had no doubt that he should be able to state the circumstances connected with it correctly. A young woman had, in early life, been seduced by a man of title : but after living with him for a certain time, she became ashamed of the course of life she was pursuing, and taking the opportunity of escaping from it, she retired into a distant part of the country, where her seducer was unable to discover her. She obtained a situation, in which she conducted herself with so much propriety, that she not only gained the good-will of her employers, but was appointed to a responsible situation in a public establishment. Some years after, her seducer discovered the place of her retreat ; and having in vain made proposals for the renewal of their intercourse, he hit upon the expedient of depriving her of the means of subsistence, thinking that he should then succeed in his attempt to possess himself again of her person. He, therefore, published in the town where she resided the history of her early life. The consequence was, that the unfortunate woman lost the esteem of the friends whom her subsequent good conduct had procured her, and she was deprived of the appointment by means of which she obtained her livelihood. Was not this woman entitled to compensation ? Yet, if she had brought an action against her persecutor, he would have justified, and she would have been turned out of Court, with the aggravation to her misfortune of having incurred a useless expense. Was it fit that the law should remain in such a state ?”

To the same purport is a case quoted, from the *Causes Célèbres*, by Mr. Borthwick, in his very able *Treatise on the Law of Libel and Slander in Scotland* :

“Le Parlement de Toulouse a décidé ainsi :—Une fille qui auroit mis clandestinement au jour un fruit de l’amour à qui elle auroit conservé la vie, pourroit se plaindre en justice du médisant qui révéleroit son déshonneur, parceque la déformation la dépouille de l’honneur dont elle jouissoit par un faux titre, mais qui ne faisoit tort à personne ; sa possession étoit légitime avec ce titre coloré. Le fore interne s’accorde encore ici avec le fore externe.”—*Histoire du Procès des Sieurs Saurin et Rousseau.*

As to cases of this kind, we see no reason to modify the opinion we formerly expressed. The conduct of the quondam lover was to the last degree culpable ; and it may perhaps be

made a question, whether the rules of society are not too severe against penitents. But so long as these rules exist, it is by no means clear that a woman so circumstanced ought to be protected in the enjoyment of a reputation based on concealment. Suppose, for example, she were about to marry, or be hired as a governess, might it not become the duty of a person acquainted with her former life to put the intended husband, or the family she was about to enter, on their guard?

At the same time we see no objection to provide that the truth should be admissible in evidence in both actions and prosecutions, but that the jury should be at liberty to give damages or find the defendant guilty, even though the formal justification were made out. This was the object of the Bill introduced by Lord Brougham in 1817. The commissioners propose a more complicated machinery:

"Acting upon the grounds which we have above suggested, we now proceed to submit the following recommendations:—

"We recommend that in respect of personal libels, two distinct classes of offences should be constituted. That one of these should be founded on the general principle of protection to private reputation against such defamatory imputations as are *false* as well as malicious. That the second should be founded on the principle already established, of protection to the public peace by preventing the publication of libels on private persons, tending to the disturbance of the peace.

"That in respect of the former class, the truth of the matter published, when it either directly or by implication contained a charge of misconduct, should be a bar to the prosecution. That in cases within the latter class, the truth of the matter published should in no case be available by way of defence to the publisher of the libel.

"But that in either case, and generally, evidence of the truth or falsity of the matter published should be admissible where the occasion of the publication was a privileged one, such as legally to raise the question as to the actual intention of the defendant, whether he acted *bonâ fide* in reference to the particular occasion, or with an actually malicious intention independently of the occasion.

"That none but a party defamed, or some other person with his consent, should be allowed to prosecute for the publication of a libel alleged to be false.

"The grounds for these suggestions have already been adverted to. As regards the first, it has already been observed that the present avowed foundation of the criminal law in the case of personal libels is too narrow, as being confined in its object, principally, if not solely, to the protection of the public peace; we think that it ought to be extended to the protection of reputation as a valuable private possession, against a malicious injury, the remedy afforded by a civil action to recover damages being wholly inadequate to afford the protection which is necessary.

"The natural consequence of such an extension of the law is the commensurate admission of the truth of the alleged libel by way of justification; the extension is founded on the notion of injury to private character, and no such injury exists, at least none such as requires restraint by the criminal law with a view to protect character, where the imputation is true, although it may still be necessary that such libels should be restrained, *sub modo*, for a different purpose, viz. the protection of the public peace. The truth of the matter published ought therefore to be a bar where the publication within the first of the above classes is alleged to be *false* as well as malicious. A different rule in respect of libels held to be criminal on the principle of protection to reputation, would be inconsistent with the law which provides a civil remedy for such an injury; that law denies the remedy where the imputation is true, either because no injury is sustained, or because it would be contrary to sound policy to award a remedy in such instances, according to the celebrated response, *Peccata nocentium nota esse et oportere et expedire*. These principles, whether they ought to prevail separately or conjunctively, apply equally to protection through the medium of penal restraint.

"We see no objection in such cases, and so far as concerns personal libels, to allow the truth to be a bar, as in the case of a civil action.

"Where the contents of the libel are not alleged to be false, but it is written with intent to provoke another to com-

mit a breach of the peace, or where its terms are such as naturally and immediately tend to a breach of the public peace, it seems to us that the truth of the contents of the libel ought not to constitute a bar to the indictment. This stands on the principle recognised by the present law,—it is essential to public peace and tranquillity to prevent their disturbance by the unnecessary publication even of that which is true ; truth itself ought not to be made use of as a colour and pretence for wreaking private malice and producing public discord.

“Again, it seems to us that in all cases where, on its being admitted or proved that the party published the alleged libel on some occasion or under circumstances recognised by the law as affording a qualified justification, dependent on the question whether he acted honestly and *bonâ fide*, in reference to the occasion, or *malâ fide*, and out of mere malice, the truth or falsity of the alleged libel ought to be admitted in evidence, the better to enable the jury to decide on the real motives and intention of the party. It is, we think, plainly inconsistent that in the first place the innocence or guilt of the party charged with libel should be made to depend on the actual disposition of mind and intention at the time of publication, and yet that one of the best and surest tests for deciding that fact should be withheld from the consideration of the jury. It is obvious that to exclude such evidence must often occasion the conviction of the innocent, and still more frequently the acquittal of the guilty ; no evidence can possibly be more cogent to show that the party was acting *malâ fide* than the fact that he knew that the injurious matter published was false.

“These provisions, we may observe, seem to unite, so far as union is practicable, the ancient with the modern law in respect of personal libels,¹ and at the same time remove an unseemly anomaly to the general rules and principles of the law of evidence.”

They partly remove one anomaly, but they introduce a

¹ “It is highly probable that by the ancient law of this country the falsehood of a libel was essential to its criminality. We should not deem ourselves to be justified in entering, on this occasion, upon any historical statement in support of this position.”

greater. As we understand the proposition, any person preferring an indictment without alleging it to be false, admits it to be true to all intents and purposes, and calls for judgment on the ground that the public peace has been infringed. But who, except in the case of violent and grossly insulting language, would ever dream of resorting to such a mode of proceeding? The proposed scheme, therefore, is tantamount to declaring that the truth, in all cases of mere calumny, shall constitute a defence. It makes no provision for cases like that instanced by Lord Cottenham, where the injurious allegation is consistent with the facts, but has been made wantonly or maliciously. In practice, moreover, considerable difficulty would be experienced in discriminating the occasions when, on the ground of the communications being privileged, evidence of the truth should be admitted, though the indictment had not alleged the libel to be false.

The Commissioners appear to have been made aware of these objections, and thus endeavour to meet them in a concluding paragraph, evidently the result of an after-thought:

“After having attentively considered the grounds upon which the criminal law of libel at present stands, and traced the causes which have given rise to objections against that law, and having submitted what appears to us to be the most expedient course for obviating those objections and removing existing prejudices, we deem it to be proper to state, on the other hand, such objections as suggest themselves to us against any deviation from the present rules and practice of the law of libel. We do this for the purpose of drawing attention to every view of the subject which occurs to us, and also for the purpose of inviting and procuring, so far as we are able, such critical remarks from experienced persons as may serve either to confirm us in our own views, or as may suggest something more desirable, or show that the present state of the law on this subject is such as to require no alteration. The main distinction which we propose is this, viz., to constitute two classes of offences as regards personal libels; the one founded on the principle recognized by the existing law, the preservation of the public peace; the other on a principle of protection to reputation analogous to that of securing property, or any other valuable right, from malicious

injury. It would be a necessary consequence of this distinction that the truth of the alleged libel could not be admitted as a bar to the former charge, but ought to be so admitted in answer to the latter. It may be objected that if this were so, it would rarely happen that any one whose character had been assailed would prosecute for a libel within the first class, as merely tending to a breach of the peace. For if the imputation contained in the libel were false, the aggrieved party would of course endeavour to vindicate his reputation by giving the aggressor the opportunity of proving it to be true, he would therefore proceed against him for having published a false libel. If, on the other hand, the imputation were true, still the party reflected on would be little likely to prosecute merely for the endeavour to excite to a breach of the peace, such a course would naturally be construed into an admission that the charge was true, and it would be inferred that he dared not venture to challenge inquiry upon the subject. It must be admitted that this would be the probable consequence. What degree of importance is to be attached to that consequence is another question. As regards the party really guilty of the imputation, the objection is weak ; being guilty he can have no real claim to protection in respect of character, and were he really placed in a situation of hardship or difficulty, yet as that would be a consequence of his own delinquency, it could afford no reason for withholding protection to those whose characters deserved it. As concerns the public, the consideration would be of little importance ; although the party reflected on declined to prosecute, any other person would be at liberty to do so, were it necessary, with a view to the interests of the public ; and it is probable that the public would derive greater benefit from the exposure of delinquency, than loss from any apprehension of danger to the public peace. We have further to observe that whatever danger or inconvenience is likely to flow from this source already exists. Any inference of guilt which might be made from the election of a party libelled to pursue a course which excluded proof of the truth of the fact, rather than one which admitted such an inquiry, may even now be made, from the election to prosecute by indictment rather than proceed by action or criminal information."

This admits, instead of answering, the objection ; for if one mode of proceeding (that for the protection of the peace) is likely to remain a dead letter, why place the calumniated party in the embarrassing situation of having to choose between the two. Suppose the defamatory statement to be true in the main, but so highly coloured and so mixed up with abusive epithets as to operate and be justly regarded as a calumny. If the sufferer treats it as an offence of the first class, he admits the colouring and exaggeration : if as an offence of the second class, he is liable to be defeated by proof of the substance. Both judge and jury might be convinced that the attack was wanton and unjustifiable, yet they must acquit.

If it be allowed that cases may occur in which the truth ought not to be a justification, why not leave them to the discrimination of the jury or the judge ? Here, however, Mr. Macaulay is against us. He thinks that it would be impossible to draw the line, and that an almost boundless discretion must be left to the administrators of the law. He also plausibly objects to the adoption of mere motive as the test :

“ It is perfectly conceivable that a person might, from no malicious feeling, but from an honest though austere and injudicious zeal for what he might consider as the interests of religion and morality, drag before the public frailties which it would be far better to leave in obscurity. It is also perfectly conceivable that a person who has been concerned in some odious league of villany, and has quarrelled with his accomplices, may, from vindictive feelings, publish the history of their proceedings, and may, by doing so, render a great service to society. Suppose that a knot of sharpers lives by seducing young men to the gaming table, and pillaging them to their last rupee. Suppose that one of these knaves, thinking himself ill used in the division of the plunder, should revenge himself by printing an account of the transactions in which he has been concerned. He is prosecuted by the rest of the gang for defamation. He proves that every word in his account is true. But it is admitted that his only motives for publishing it were rancorous hatred and disappointed rapacity. It would surely be most unreasonable in the court to say, ‘ You have told the public a truth which it greatly concerned the public to know. You have been the saving of many promising youth. You have been the means of ridding society of a dreadful pest. You have done, in short, what it was most desirable you should do. But as you have done this, not from public

spirit, but from dislike of your old associates, we pronounce you guilty of an offence, and condemn you to fine and imprisonment. It is evident that society cannot spare any portion of the services which it receives."—*Penal Code prepared by the Indian Law Commissioners.*

Undoubtedly, it would never do to make the quality of a defamatory publication dependent on extraneous circumstances. Still we see no reason for a positive enactment to the effect—that strict literal proof of the mere matters of fact shall constitute a justification, unless the truth of the defamatory statement in all its bearing shall be admitted at the outset by the prosecutor. It would be far better to say at once that criminal prosecutions shall henceforth stand on the same footing with actions, as regards evidence of the truth; leaving libels of the provocative kind to be punished as challenges or other acts of violence. Mr. Macaulay, speaking in the name of the Indian Law Commissioners, remarks :

"It appears to us evident that, between the offence of defaming and the offence of provoking to a breach of the peace, there is a distinction as broad as that which separates theft and murder. Defamatory imputations of the worst kind may have no tendency to cause acts of violence; words which convey no discreditable imputation whatever may have that tendency in the highest degree. Even in cases where defamation has a tendency to cause acts of violence, the heinousness of the defamation, considered as defamation, is by no means proportioned to its tendency to cause such acts; nay, circumstances which are great aggravations of the offence, considered as defamation, may be great mitigations of the same offence, considered as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer, contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace.

"On these grounds we have determined to propose that defamation shall be made an offence, without any reference to its tendency to cause acts of illegal violence."

It is to be provided that no one shall prosecute for the second class of offences, i. e. those in which the truth is brought into question, except the party calumniated.

Lord Brougham highly approves of the mode of proceeding by criminal information :

"The advantage of proceeding by criminal information is this : it erects the Court of King's Bench (and this was always Lord Erskine's opinion, entitled to great deference on all subjects, but on none more than on this) into a court of honour, which may well administer the law of honour between party and party, with a due attention both to the wounded feelings of the individual and to the preservation of the peace. But it has this singular advantage besides, that it enables the party defamed, on his oath, to purge himself of the offence charged, and gives him an opportunity of defying his adversary to prove the truth of his accusation. It is in this particular doubly advantageous beyond an action, which simply defies the slanderer to prove his charge ; and from its nature this may be impossible, though the thing may all the while be true ; so that bringing an action really often leaves the truth or falsehood very doubtful ; for how many charges are there which may be quite true, the gravest charges of all, and in which an action is *brutum fulmen*, because the defendant cannot by possibility have evidence of it ; and so the bringing an action may only show that the plaintiff is conscious of having committed the offence charged, but certain also there can be no evidence against him. For instance, if a man is charged with adultery or seduction, very grave offences, which in the minds of many persons are so grave that he who is guilty ought to be driven from society, the truth of the charge may be known to himself and his paramour only, and thus it is just as likely, after the verdict for damages shall pass, that the slander was true as before the action was brought. The event will only have proved that no waiting-maid or valet-de-chambre had been able to give evidence, or that no one but the parties was cognizant of the fact. But those persons having to come before the Court with affidavits of denial, as well as exposing themselves to affidavits of the opposite party, it does not follow that the same persons who would proceed by action would venture to swear, and both perjure themselves, and let it be known each to the other for ever after, that he had been guilty of one of the foulest crimes that man can commit,

namely, perjury. These are the reasons why I think the application in Court for a criminal information, under the statute of William, is a very important and beneficial proceeding for a person defamed."

He is of opinion, however, that the Court ordinarily requires too much in calling upon the party to deny every tittle of the alleged calumny:

"For example, a person may be charged with an assault with intent to commit an unnatural crime, but he may have committed an assault of a comparatively innocent nature; or he may be charged with an assault on a female with intent to commit a rape, and yet he cannot get a criminal information, according to the practice some years ago prevalent in the Court of King's Bench (I believe it is now a little relaxed), unless he can deny the less as well as the more important part.—See the situation of such a man."

These examples are not happily chosen; and Lord Brougham should remember, that, if the Court ceased to require a satisfactory denial of every thing of an opprobrious character, its jurisdiction as a court of honour would be at an end. The following is a much better illustration:

"In the case of an Irish baronet for whom I was of counsel also with Mr. Baron Parke, the charge was a breach of duty as high sheriff at an election in Ireland from corrupt motives. He proved every thing to be false and wilfully false, from the beginning to the end of the libel; but he could not disprove the charge of error in judgment, as to the time when the troops and the police were called out. The Court of King's Bench, to the great regret of the counsel, discharged the rule; but they discharged it at the cost of the defendant. It was a libel of an aggravated nature, in a speech made by a member in the House of Commons, and made, as was sworn and not denied, in the presence of no person who was enabled, by his knowledge of the facts, to answer it; and a copy of the speech was also sworn to have been sent to a newspaper, and yet he got off by paying the costs of the application."

The Commissioners suspend their opinion:

"The subject of proceeding by criminal information will more properly fall under the head of process. We may here however observe that this course of proceeding seems at all events to call for some modification. We think that if the prosecutor be allowed to state the falsity of the imputation as a ground for the application, the defendant ought to be allowed

to give evidence upon the trial of the truth of the alleged defamation. We think also that if this mode of proceeding be productive of peculiar advantages, it ought to be rendered more generally available."

The only remaining recommendation deemed of sufficient importance to occupy a place in the Prefatory Remarks, is that any person legally responsible as editor, publisher, or otherwise, of any newspaper or periodical work, shall be allowed, in cases where no actual malice can be proved against him, to throw off the responsibility by disclosing the name of the author. The grounds of this recommendation are obvious. Its policy is dubious at the best. When, to get rid of responsibility, it shall be simply necessary to disclose the name of an author and supply evidence of the fact, printers, editors, and publishers need run little risk of prosecution, so long as men of straw can be procured. As for actual malice, it would generally be impossible to prove any thing of the sort.

In order to bring the recommendations into immediate juxtaposition with the remarks, we have passed over some intervening topics which require a brief notice.

It is doubtful how far a defamatory publication can be justified on the ground of its being a true report of judicial proceedings. In *Curry v. Walter*,¹ and *The King v. Wright*,² this was held to constitute a defence, and though these decisions were somewhat shaken by what fell from the judges in *The King v. Carlile*,³ the Commissioners are of opinion that such a report would be justifiable, and have included a rule to that effect in their Digest.

The proceedings of police offices stand on a different footing. The publication of an ex parte proceeding containing defamatory matter is clearly not privileged, though daily practice would imply the contrary. But police reports are tolerated like reports of parliamentary debates, which are at direct variance with the standing orders of both Houses. The Commissioners remark :

"It is notorious that no preliminary inquiry takes place before a magistrate or coroner, of the slightest public interest, the particulars of which are not immediately communicated to

¹ 1 Bos. & P. 525.

² 8 T. R. 203.

³ 3 B. & Ald. 167.

the public by means of the daily press. It must be wrong either that the rule should exist, or that its open and daily violation should be tolerated. If the mischievous consequences which are alleged to be the foundation of this criminal rule do in reality result from the practice, it is no slight reproach to the practical administration of the criminal law that the practice should be permitted to exist almost without restraint. If, on the contrary, no such inconvenience results as ought to constitute a prohibition, the rule is not merely useless, but may be abused for unjust and oppressive purposes in particular instances, and a party who has done no more than is daily allowed to be done with impunity would have just ground for complaining of a deviation from the ordinary course to serve particular purposes. Finding that such a rule is sanctioned by several authorities, we have accordingly introduced it into the Digest. We cannot, however, but think that either the law ought to be subject to some limitation, or that, if really found to be essential to the ends of justice, it should, for the attainment of those ends, be better enforced."

Many think that these reports, as at present conducted, do more harm than good. The avowed object being to supply entertaining matter for the newspapers, the inquiries best calculated to excite laughter or stimulate the prurient appetite of the public, are selected for publication; and where none possessing this quality present themselves, those of the more common-place order are fitted for the purpose by a few judicious touches. The consequence is, that no one can present himself in a police office without incurring the risk of becoming an object of ridicule for a week, and it requires a rare degree of moral courage to co-operate in the enforcement of the law by appearing as witness or prosecutor.

As to the check imposed by publicity, it may be doubted whether the offenders who occupy the chief part of a magistrate's time, are not often more pleased than pained by it. To borrow Dr. Johnson's illustration,—there are persons with such a diseased appetite for notoriety, that they will roll in a gutter to make people stare and look at them. If they cannot be famous, they will be infamous. It is the quiet respectable citizen who suffers martyrdom at the thought of having his dress, address, conduct, and motives quizzed, caricatured, misunder-

stood, and misrepresented for the edification of his friends; and who consequently allows himself to be cheated by cabmen, driven over by omnibuses, or hustled by drunken heroes of the swell mob, with impunity. At the same time it must be admitted that justice of all sorts, particularly what Fielding terms justices' justice, is most satisfactorily administered in open courts; and that it is better to be laughed at occasionally, than to run the risk of finding one's liberty or character dependent on the result of a private examination. The only available remedy is in the hands of the magistrates themselves, who are invested with ample powers for controlling the reporters, if they could only be induced to exercise them.

The question supposed to be set at rest by the celebrated Libel Act of Mr. Fox, is discussed at some length; and the Commissioners, apprehending that some discrepancy of opinion still exists, conceive that the doubt should be set at rest by legislative authority. We have always understood that the received interpretation was that concisely expressed by Mr. Justice Best (now Lord Wynford) and quoted with approbation in the Report.

"It must not be supposed that the statute of George the Third made the question of libel a question of fact; if it had, instead of removing an anomaly it would have created one. Libel is a question of law, and the judge is the judge of the law in libel, as in all other cases; the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the manner in which it was left before that time. Judges are, in express terms, directed to lay down the law as in other cases. In all cases the jury may find a general verdict; they do so in cases of murder and treason, but then the judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion."

A recent prosecution has induced us to devote a separate article to *Offences against Religion*, which come next. The Report also includes Digests of the existing law regarding *Offences relating to the Coin*, and *Offences relating to the Revenue*; but as nothing in the way of introduction or prefatory remark appears about them, it is only necessary to state that they form part of the contents.

H.

ART. II.—LIFE OF LORD TENTERDEN.

"LABORE," the motto which this great lawyer selected on his promotion to the bench, is not sufficiently indicative of the cause of his success. To a long course of patient, persevering industry, directed to one sole object—the attainment of professional knowledge—Mr. Abbott brought an acute and logical mind, fixed moral habits, and a determined will, that strove with difficulties and abhorred dissipation. His life may form an useful study to every member of the profession, whose capabilities of conferring wealth and fame on the most humble student it so well illustrated; for, though unenlivened by stirring incident, and barren of adventure, it proves that diligence in the study of the law, self-relying, self-restricting, will achieve a high reward without patronage—that the lawyer of sound abilities, and dogged application, will write out his own passport to rank and fortune.

Mr. Abbott was born in Canterbury on the 7th of October, 1762, the son of a barber. Cervantes, Le Sage and Scott, in their lively portraits of cunning shavers, appear to have divided the species into two classes; the one grave and pensive, the other rotund and garrulous. Old Mr. Abbott belonged to the former class, and has been described in an early number of this Magazine as "a tall, erect, primitive looking man, with a large club pig-tail, going about with the instruments of his business under one arm, and attended frequently by his son Charles, a youth as decent, grave and primitive looking as himself." Both the parents, though poor, were respected for their good conduct, and on their head-stones might have been inscribed the eulogy which Franklin wrote on his father and mother in a rank of life equally humble, that "he was pious and prudent—she, discreet and virtuous."

Their son Charles drew his first breath within the precincts of the cathedral, close to its great western portal, in the same mean looking tenement, from which had emerged a countess of Salisbury in the olden time. The excellent grammar school of his native city afforded to day scholars the cheap means of a sound education. Accordingly young Abbott was entered in 1769 on the foundation of the king's school of the cathedral, founded by Henry VIII., under the tuition of

Dr. Osmund Beauvoir, who is stated by Sir Egerton Brydges to have been an admirable classical scholar, of fine taste, and some genius.

The literary baronet, young Abbott's first and firm friend through life, has given, with some pardonable egotism, a characteristic description of the future chief justice in his boyish days. "I became acquainted with him in July 1775, when I was removed from Maidstone to Canterbury school. From his earliest years he was industrious, apprehensive, regular and correct in all his conduct, even in his temper, and prudent in every thing, and early gave presages of future distinction. I was about six or seven years his junior in age, and was placed in the same class with him; in which, after a short struggle, I won the next place to him, and kept it till I quitted school for Cambridge, in the autumn of 1780, in my eighteenth year. Though we were in some degree competitors, our friendship was never broken or cooled. He always exceeded me in accuracy, steadiness, and equality of labour, while I was more fitful, flighty and enthusiastic. He knew the rules of grammar better, and was more sure in any examination or task. He wrote Latin verses and prose themes with more correctness, while I was more ambitious, and more unequal, and preferred translating Horace into English verse to writing moral essays, whether in Latin or in English. There was the same difference in our tempers and our tastes. He was always prudent and calm—I was always passionate and restless. Each knew well wherein the other's strength lay, and yielded to it."

An accurate likeness has also been sketched by another schoolfellow¹ of the patient boy, who never "crept with satchel" on his shoulders "unwillingly to school." "I remember him well, grave, silent and demure; always studious and well behaved, reading his book instead of accompanying us to play, and recommending himself to all, who saw and knew him, by his quiet and decent demeanour. I think his first rise in life was owing to a boy of the name of Thurlow, an illegitimate son of the lord chancellor, who was at Canter-

¹ A third schoolfellow knew Lord Tenterden better than either, though he has left no written recollections of his patron, whom he served for many years, and after his elevation to the bench, as a faithful and confidential clerk.

bury free school with us. Abbott and this boy were well acquainted, and when Thurlow went home for the holidays he took young Abbott with him. He thus became known to Lord Thurlow, and was a kind of helping tutor to his son; and I have always heard and am persuaded, that it was by his lordship's aid he was afterwards sent to college. The clergy of Canterbury, however, always took great notice of him, as they knew and respected his father. When Lord Tenterden and Mr. Justice Richards, on going the circuit, once visited the cathedral of Canterbury, the latter took notice of a singing man in the choir who had an excellent voice. 'Ah!' said Lord Tenterden, 'that is the only man I ever envied. When at school in this town, we were candidates together for a chorister's place, and he obtained it.'"

On the accuracy of this anecdotist's personal recollections much firmer reliance may be placed than on the soundness of his conjectures. There was no need of illegitimate influence to furnish a clever and modest boy with the means of reaching college as an exhibitioner, his school furnishing this advantage; and the clergy, upon whose heads old Mr. Abbott operated, like the venerable Caxon upon Jonathan Oldbuck's, being ready dispensers of its patronage. That they were not loath to eke out the pittance with which an abstemious youth, giving no wine parties, wanting no private tutor, innocent of horse-flesh, might contrive to subsist at the university, we have the testimony of the learned judge himself for asserting. He attended a meeting of the trustees of Canterbury school to consider an application from an exhibitioner, then at some college in Oxford, for an increase of his stipend. An inquiry was made for precedents, and only one could be at all recollected, which had occurred many years before. "That student was myself," said the learned judge, who immediately made the advanced allowance sought by the petitioner out of his own private purse.

His grateful sense of the benefits he had derived from the institution was expressed by the then Mr. Justice Abbott, with much warmth, upon another occasion. In 1817, the centenary of the school, he accepted an invitation to Canterbury, witnessed the examination of the scholars, addressed the successful candidates, and, after attending the usual ser-

vice and sermon at the cathedral, dined with the masters and members of the institution at the principal hotel of the city. In his speech after dinner he expressed himself with feeling and effect, and declared that to the free school of Canterbury he owed, under the divine blessing, the first and best means of his elevation in life. Nor was his gratitude confined to words. With a tasteful retrospect of the causes of his own success, he founded and endowed two annual prizes; the one for the best English essay, the other for the best Latin verse. It was in the same grateful spirit for his own scholastic advantages that Dean Tucker provided the means of education to boys as poor as he had been. "I felt the want of such assistance in my little way," said the worthy clergyman, "when I was somewhat in their situation, and therefore resolved with myself, at an early period in life, that, if ever Providence should enable me to call uncommon, or useful, talents out of obscurity, I would do it. That opportunity Providence has now put into my hands." With a like feeling Dr. Franklin gave the interest of £100 to be laid out annually in silver medals, as rewards for scholarship, in the academy where he had been brought up. To the credit of grateful scholars such instances might be multiplied a hundred fold. There is scarcely a grammar school in England, on whose table similar harvest offerings have not been laid by the rich or noble, whom the founder's bounty formerly fed and taught, attesting in the tribute, at once the merits of the foundation, and their own.

In the beginning of 1788 Mr. Abbott, then seventeen, was elected scholar of Corpus Christi College, Oxford, with the pittance, including his exhibition, of £50 a year. His matriculation succeeded, by an interval of little more than half a dozen years, that of the two Scotts (the future Lords Stowell and Eldon), then holding college fellowships of £120 per annum, destined with himself to become the three heads of the law. Perhaps there could not at the time have been found three more simple, humble, modest looking men within the compass of the university, and certainly not three men, from whose air and deportment, any one could less have augured such a splendid futurity. At that period *Alma Mater*, ever too frugal in distributing honours and rewards, had no

class list, in which to include, by an exact scale of merit, classical or mathematical attainments. Her chancellor's medals for Latin and English composition were only two, both of which Mr. Abbott was clever and fortunate enough to gain. He failed in his attempt the first year, but enjoyed the gratification of reading on the copy of verses returned to him the "*quàm proximè accessit*," the mark of honour bestowed on the second best. The candidate who carried off the medal—the subject "*Calpé obsessa*"—was the amiable poet, the Rev. W. L. Bowles, then a scholar of Trinity, whom the judge met at Salisbury, for the first time, more than forty years after the awarding of the prize. His lordship immediately reverted to the literary contest in which he had been vanquished, the conflicts and distinctions of the university being rarely, if ever, forgotten.

In his third year at Oxford young Abbott stood up in the theatre to recite his prize poem of "*Globus Ærostaticus*;" the air balloon, which Lunardi had about that time introduced into England, having filled the minds of men with amazement and speculation. In 1786 the scholar of Corpus again received the plaudits of the university, assembled to hear his admirable prize essay "*On the Use and Abuse of Satire*."

This composition, choice in language, full of learning, replete with argument and illustration, may be placed among the very best of the Oxford classics, even though illustrated with the names of Scott, and Addington, and Grenville. Interesting in the subject, it derives additional interest from the circumstance of the author having been called upon to sit in judgment on his early opinions. Our space will only permit of a few selections. The clear analytical division of the subject proves a logical mind.

"Early use of panegyrical and satiric composition, gradual increase of the latter with the progress of refinement.

"Different species of satire, invective, and ridicule.

"General division of satire into personal, political, moral and critical.

"I. 1. Personal satire necessary to enforce obedience to general instructions. 2. Its abuse, when the subject is improperly chosen, when the manner is unsuitable to the subject, and when it proceeds from private animosity.

"II. 1. Political satire, necessary for the general support of mixed governments. 2. Its abuse, when it tends to lessen the dignity of the supreme authority, to promote national division, or to weaken the spirit of patriotism.

"III. 1. Moral satire, its use in exposing error, folly, and vice. 2. Its abuse, when applied as the test of truth, and when it tends to weaken the social affections.

"IV. 1. Critical satire, its use in the introduction and support of correct taste. 2. Its abuse, when directed against the solid parts of science, or the correct productions of genius.

"Conclusion. Comparison of the benefits and disadvantages derived from satire. Superiority of the former."

Mr. Abbott's reflections on personal satire are forcible and just.

"Personal satire has been successfully directed in all countries against the vain pretenders to genius and learning, who, if they were not rendered contemptible by ridicule, would too often attract the attention, and corrupt the taste of their age. By employing irony the most artful, and wit the most acute, against the unnatural and insipid among his contemporaries, Boileau drew the affections and judgment of his nation to the chaste and interesting productions of Molière and Racine.

"Such have been the advantages derived from personal satire, but so great on the contrary are the injuries resulting from its misapplication, that the legislature of all nations has been exerted to restrain it. For if they, whose failings were unknown and harmless, be brought forth at once to notice and shame, or if, for the weakness common to human nature, illustrious characters be made objects of contempt, the triumphs of vice are promoted by increasing the number of the vicious, and virtue loses much of its dignity and force, by being deprived of those names, which had contributed to its support. Not less injurious to science is the unjust censure of literary merit, which tends both to damp the ardour of genius, and to mislead the public taste. The most striking examples of the abuse of personal satire are furnished by that nation, in which its freedom was the greatest. The theatres of Athens once endured to behold the wisest of her philosophers, and the most virtuous of her poets, derided with all the grossness of malicious scurrility. Nor has modern poetry been altogether free from this disgrace. Fortunate, however, it is that, although the judgment of the weak may be for a time misguided, truth will in the end prevail: the respect and admiration due to the names of Burnet and of Bentley, of Warburton

and of Johnson, are now no longer lessened by the wit of Swift, or the asperity of Churchill.

"Even where the subject or design is not improperly chosen, abuse may still arise from the disposition and colouring of the piece. When bitterness and severity are employed against men, whose failings were venial and light, or ridicule degenerates either into the broad attacks of sarcastic buffoonery, or the unmanly treachery of dark hints, and poisonous allusions, not only the particular punishment is excessive and unjust, but also general malice is fostered by new supplies of slander."

Upon the whole, our young author thinks that the good effects of satire are far more widely spread, and more enduring than the bad.

"From this general representation of the good and ill effects of satire, we may be enabled to form a comparison of their respective importance. By the improper exercise of satire individuals have sometimes been exposed to undeserved contempt; nations have been inspired with unjustifiable animosity; immoral sentiments have been infused; and false taste has received encouragement and support. On the contrary, by the just exertions of satire, personal licentiousness has frequently been restrained; the establishments of kingdoms have been supported, and the precepts of morality and taste conveyed in a form the most alluring and efficacious. The success, however, of all those productions that have not been directed by virtue and justice, has been confined and transient, whatever genius or talents might be employed in their composition; by the wise among their contemporaries they have been disregarded, and in the following age they have sunk into oblivion. But the effusions of wit, united with truth, have been received with universal approbation, and preserved with perpetual esteem; their influence has been extended over nations, and prolonged through ages. Hence, perhaps, we need not hesitate to conclude that the benefits derived from satire are far superior to the disadvantages with regard both to their extent and duration; and its authors may therefore deservedly be numbered among the happiest instructors of mankind. Charles Abbott, A.B. 1786, Corpus Christi College."

The successful essayist and elegant Latin scholar was soon rewarded with a college fellowship, and appointed junior tutor to Mr. (afterwards Bishop) Burgess, his early friend and admirer. Among the private pupils, whom this office introduced to his care, was a son of Mr. Justice Buller, a fortunate

introduction, as it rescued the future ornament of the law from that comparative seclusion, in which his days would otherwise have worn away. The sagacious judge, to whose clear appreciation of talent this country has been on other occasions indebted, immediately recognized the strong and solid understanding of the Oxford scholar, and recommended him earnestly to embrace the legal profession in preference to the church, for which he had hitherto designed himself. Mr. Abbott yielded to his kind advice, and in the year 1788, when he was in his twenty-sixth year, entered his name in the books of the Inner Temple. He submitted also, in compliance with the judicious suggestion of the experienced lawyer, to the drudgery of attending for some months the office of the great London solicitors Messrs. Sandys & Co. of Craig's Court, whose wearisome mechanical details must have formed a sad contrast to the charms of classical composition, and elegancies of literary leisure, in which he had rejoiced so long.

In the dusky avenues of Brick Court he gave himself up without any useless repining, to the development of the mysteries, which surrounded his new course of study. From the attorney's office he went to the chambers of Mr. (afterwards Baron) Wood, a regular black-letter veteran, the most profound lawyer of his day. Aided by his recommendation, Mr. Abbot began himself to practise the science of a special pleader with marked success. The ever open door, quick attention when despatch was particularly requested, the neat pleadings, and safe opinions, soon increased the number of clients, who renewed their visits to his chambers, and inspired him with courage to be called to the bar.

He was called by the Society of the Inner Temple (on the same day as Mr. Peake by Lincoln's Inn,) in Trinity term, 1795. Both having selected the Oxford circuit, the rule was established, which has since been invariably followed, that he should be considered senior whose name had been the longest on the books of his society. On circuit Mr. Abbott speedily rose into the leading business as junior, too quickly, indeed, not to excite some jealous animadversion. There are yet extant rumours of his having been deemed too courteous to attornies, and of having displayed too keen an appetency

for briefs. By his leaders in silk, whether in banc or at nisi prius, the merits of a junior, who could often suggest a case in point, and thoroughly master the most abstruse technicalities of pleading, were soon appreciated and readily acknowledged.

Sir Vicary Gibbs, in particular, afforded him at least all the encouragement that professional etiquette would allow. When solicitor-general, acting on the principle "*Detur digniori*," he appointed Mr. Abbott to that important office which is dubbed with the familiar title of Treasury-devil, that is, the junior counsel to whose care the legal business of the government is intrusted. In this character he assisted at all the state trials which darkened by their fearful recurrence the close of the last century; the prosecution of Crossfield for high treason in 1796; of Reeves for a libel on the English constitution in 1797; and of O'Coigly and O'Connor for treason in 1798.

As the proofs of his efficiency multiplied, the junior of the Treasury was selected for the office of standing counsel to the Bank and other great mercantile communities, whose confidence could not but induce that of individuals. Early and late his chambers were besieged by clients; and encouraged by success, he risked that step in life on which lawyers as a body are nothing loth to venture, an early marriage. On the 13th of July, 1795, he was married to Mary, eldest daughter of John Lagier Lamotte, Esq., a gentleman of fortune residing at Basilden in Kent. It is said that when the father hinted the expediency of a marriage settlement, he answered bluntly, that he had nothing but an excellent law library, which the lawyers might tie up as tightly as they pleased.

Mr. Abbott's marriage with this lady, who survived him, and by whom he had two sons and two daughters, was accompanied with so much domestic happiness, that he afterwards lived wholly in his own family, and associated less with his brethren of the bar than any man of the day. It has been recorded of himself by a good husband and prolific author, that he deserved well of his country, having caused two hostages of merit to be presented to the commonwealth yearly for twenty years,—a book and a baby! Though Mr. Abbott could not lay claim for more than the first year to such a double paternity, he so far followed the precedent as imme-

diately to crown his matrimonial cares with the honours of authorship. His *Treatise on the Law of Merchant Shipping and Seamen* will always rank among the few classical works that adorn modern jurisprudence. In the dedication to Lord Chancellor Eldon, he states that his lordship had suggested the subject, and that he had undertaken it by his advice.

This book is very strongly marked with that lucid common sense, and diligent reading, which had always characterized the author. The method is original, and the distribution of his topics not unworthy of Blackstone. The style is singularly plain and unaffected, and therefore good. The late Mr. Dodd, a competent authority, has pronounced a warm eulogium on the merits of a work, which has gone through more editions than any modern law book. Its unerring accuracy, judicious union of a correct analysis of cases, with a connected dissertation on the subject, and extensive researches into the writings of foreign jurists, make the volume as admirable for style and erudition, as eminently useful for its practical views and luminous arrangement. These qualities have called forth the repeated praises of Lords Stowell, Eldon, and Ellenborough, and have rendered it a practical guide and vade mecum on all questions of marine law,—a chart by which the litigating mariner may safely direct his course.

To what extent Mr. Abbott's professional gains, considerable before, were enhanced by the success of this publication, we have his own authority for declaring. In general the emoluments of the practising lawyer are grievously exaggerated, according to Dr. Johnson's axiom, that, when numbers are guessed, they are always magnified. But Mr. Abbott's fee-book was laid open to public scrutiny through the exactions of the law, and his punctilious adherence to its mandates. When the returns to the income-tax were called for, he sent an account, which astonished the collector, not less by its curious accuracy, than the sum total, being the precise amount of his fees received during the past year, 8026*l.* 5*s.* . . . The shrewd tax-gatherer, a native of the place, insinuated that all the gentlemen of the inns of court were not quite so conscientious in their returns; the worthy functionary might, however, have taken into consideration that not a dozen members of the fraternity had such returns to make.

His income from the profession so largely exceeding the salary of a judge, he declined in 1808 from prudential motives the offer of a seat on the bench, at the time when Mr. Justice Lawrence removed from the King's Bench to the Court of Common Pleas. That income increased with each succeeding year, and enabled the thrifty lawyer with the profits of his judicial station to leave on his death a large real estate, and personal property to the amount of 120,000*l*.

Though thus eminently fortunate, and at the head of chamber counsel, that valuable body from whom the old title of counsellor is derived, Mr. Abbott always shunned the dangerous honours of a silk gown, and never basked but once in the splendour of a special retainer. As a leading *nisi prius* advocate he never could have distinguished himself. An advocate, besides quickness of apprehension and acuteness, ought to possess considerable fervour of imagination, and excitability of disposition. But a man of fervent temperament is very apt to see some parts of a case in a stronger light than that in which he ought to see them, and to shade other parts. Mr. Abbott's great equanimity and coolness, his aptitude in taking correct rather than strong views of a case, his disposition to attribute to each part of a cause its due importance, and no more, qualities invaluable in a judge, impaired his efficiency as an advocate.

We learn from the graphic sketch of Lord Brougham, how different an estimate would be formed of his power by those who saw him in court, or met him in consultation.

“A man of great legal abilities, and of a reputation, though high, by no means beyond his merits. On the contrary it may be doubted, if he ever enjoyed all the fame, that his capacity and his learning entitled him to. For he had no shining talents; he never was a leader at the bar; his genius for law was by no means of the depth and originality which distinguished Mr. Holroyd; nor had he the inexhaustible ingenuity of Mr. Littledale, nor perhaps the singular neatness and elegance of Mr. Richardson. His style of arguing was clear and cogent, but far from brilliant; his opinions were learned and satisfactory, without being strikingly profound; his advice, however, was always safe, although sometimes, from his habitual and extreme caution, it might be deficient in boldness or vigour. As a leader he very rarely and by some extraordinary ac-

cident appeared, and this in a manner so little satisfactory to himself, that he peremptorily declined it whenever refusal was possible. Indeed he showed none of the capacity which distinguished Mr. Holroyd when the same unwelcome chance befel him, for he seemed to have no notion of a leader's duty, beyond exposing the pleadings and the law of the case to the jury, who could not comprehend them, with all his explanation. His legal arguments, of which for many years the books are full, were extremely good, without reaching any very high pitch of excellence; they were quite clear, abundantly full of case law, betokening some dread of grappling with principle, and displaying none of the felicitous commentary that marked Mr. Holroyd."

None knew, or felt, these deficiencies more thoroughly than Mr. Abbott himself; who, as his pecuniary means expanded, and his youthful energies declined, began to tire of forensic duty, and to yearn for the comparative tranquillity of the bench. "For twenty years," says Sir Egerton Brydges, "he had worked at the bar with steady and progressive profit and fame, but with no sudden bursts, or momentary blaze. At length his health and spirits began to give way. I well remember, in the year 1815, his lamenting to me in a desponding tone that his eyesight was impaired, and that he had some thoughts of retiring altogether from the profession. I dissuaded him, and entreated him not to throw away all the advantages he had gained by a life of painful toil, at the very period when he might hope for 'otium cum dignitate.' I left him with regret, and under the impression that his health and spirits were declining."

The Chancellor was, however, too apprecient of Mr. Abbott's worth to listen to a resolution, which he had probably conceived in an hour of suffering from dyspepsia, and never seriously contemplated. In February 1816, a seat as puisné judge in the Court of Common Pleas was again placed at his disposal, and accepted. He was made serjeant on the 12th February, and gave rings with the characteristic motto "labore." His brother serjeants, accustomed to the clamours of the forum, estimated his talents at a much lower rate than the head of the law. Some murmured, and others openly complained that their bar might have afforded a lawyer more adequate to the situation, and that the "band of brothers" were not well treated in having a King's

Bench lawyer, and one of such moderate *nisi prius* practice, advanced over the leaders in that court. The knowledge of the new judge was very unjustly underrated by these complainants. As a lawyer, there were very few in the Common Pleas who could have sustained any comparison with him; and as a scholar he was superior to most. He had read more law than almost any man of his day; and had extended his researches, where they had never deemed it necessary to propel their labours, into the foreign jurists.

The grave and decorous deportment of Mr. Justice Abbott did not torment long these rough and boisterous serjeants. In the May of the same year, a vacancy occurring in the King's Bench, on the death of Mr. Justice Le Blanc, Judge Abbott was requested to supply the vacancy. He expressed some aversion at first to exchanging the comparative ease of his court for the toil of the other, but yielded at length to the anxious importunity of Lord Ellenborough. In two years the health of that distinguished judge declined, and on the 4th of November 1818, fourteen years to a day before his own death, Sir Charles Abbott was appointed Chief Justice of the Queen's Bench.

With what admirable skill, honour and steadiness he fulfilled the laborious, difficult, almost overwhelming duties of his high station, is universally acknowledged. Testimony can go no higher than the following description from an eye witness, the first in rank and weightiest in authority, Lord Brougham. In his *Historical Sketches*, he has given the following description of the head of the court in which he had himself practised so long:

“Although his reputation at the bar was firmly established for a long course of years, it was not till he became a judge, hardly till he became chief justice, that his merits were fully known. It then appeared that he had a singularly judicial understanding, and even the defects which had kept him in the less ambitious walks of the profession—his caution, his aversion to all that was experimental, his want of fancy—contributed, with his greater qualities, to give him a very prominent rank indeed among our ablest judges. One defect alone he had, which was likely to impede his progress towards this eminent station; but of that he was so conscious as to protect

himself against it by constant and effectual precautions. His temper was naturally bad ; it was hasty and it was violent, forming a marked contrast with the rest of his mind. But it was singular with what success he fought against this, and how he mastered the rebellious part of his nature. Indeed it was a study to observe this battle, or rather victory, for the conflict was too successful to be apparent on many occasions. On the bench it rarely broke out, but there was observed a truly praiseworthy feature, singularly becoming, in the demeanour of a judge. Whatever struggles with the advocate there might be carried on during the heat of a cause, and how great soever might be the asperity shown on either part, all passed away—all was, even to the vestige of the trace of it, discharged from his mind, when the peculiar duty of the judge came to be performed ; and he directed the jury, in every particular, as if no irritation had ever passed over his mind in the course of the cause. Although nothing can be more manifest than the injustice of making the client suffer for the fault or the misfortune of his advocate—his fault, if he misconducted himself towards the judge, his misfortune, if he unwittingly gave offence—yet, whoever has practised at *nisi prius* knows well, how rare it is to find a judge, of an unquiet temper, especially one of an irascible disposition, who can go through the trial without suffering his course to be affected by the personal conflicts, which may have taken place, in the progress of the cause. It was therefore an edifying sight to observe Lord Tenterden, whose temper had been visibly affected during the trial (for on the bench he had not always the entire command of it, which we have described him as possessing while at the bar), addressing himself to the points in the cause, with the same perfect calmness and indifference, with which a mathematician pursues the investigation of an abstract truth, as if there were neither the parties nor the advocates in existence, and only bent upon the discovery and the elucidation of truth.

“ His eminence as a judge was great and undeniable ; it was in a short time confessed by all, even by those who had some prejudice against him at first, from marking the extreme contrast between him and his more brilliant predecessor, and from the impression generally prevailing, and in general well founded, that men, who have never led causes at the bar, make

indifferent judges, and are unequal to the despatch of judicial business. Lord Tenterden from the first displayed great judicial capacity, yet it is certain that, for some time, he formed a very remarkable exception to the rule. He took no general and comprehensive view of a case; he examined its details part by part; he did not, like a leader, get up on an eminence, and from thence survey the object in all its bearings, nor was he aware of the relative importance of its different portions. But in order to perform his office he would select one particular compartment, and he would choose not the most difficult. To this he bent his attention, and seemed a good deal troubled, and even impatient if it were drawn away to other points, not within the limits, which he had chosen to trace. It is remarkable not only how this habit wore off, instead of being confirmed and extended, but also how great a start he made in improvement after he had been five or six years chief of his court, and on the occasion of a long and severe illness, that seemed to render his retirement from the bench inevitable. His temper was softened, his attention became more comprehensive, he viewed things more upon an enlarged scale, his industry was not relaxed, increased it could not be, and during the last seven or eight years of his time he exhibited a very eminent instance of great judicial capacity; at all times his law was safe, and accurate, and ready, but he could deal now far more ably with facts.

“ It must not be forgotten that the right decision of causes is only one, though certainly the most important, office of justice; another, only second in importance to that, is the giving parties satisfaction, such satisfaction as is enough for reasonable persons. Now as every person is impressed with the idea that there is but one cause in the world, and that his own, however unmindful of this the Court and the counsel may be, discontent, heart-burnings, feelings of injustice suffered, desire of redress in other ways, and, among these, oftentimes by means of other suits, is sure to be kept in the train of Themis when the pace she moves at is too rapid for ordinary eyes to follow, and breaks through the surrounding ties and feelings of interest too rudely. Hence the despatch effected is frequently more apparent than real, of which a re-

markable example used to be afforded by Sir John Leach, whose swift decisions, without hearing, only produced *appeals* to the great seal. But in whatever way these opinions may be disposed of, one thing was certain, the kind of arrangement which has been described as prevailing among the leaders in Lord Ellenborough's time, would only be found practicable, as long as the lead should be confined within a very few hands. When it was at all scattered, such a thing was altogether out of the question, and in Lord Tenterden's time this distribution undeniably took place. It may be supposed, from what has been said of his scientific, as well as classical acquirements, that in trying causes, where these accomplishments could be displayed, he rose above the ordinary level of his great merit. To see him preside over a complicated patent case was a very great treat, whether to a lawyer or a man of science. It was a singular exhibition of legal, combined with mechanical, skill, each keeping within its own proper sphere, but each conspiring with the other to obtain the full investigation of the cause in all its bearings, and its clear elucidation to the jury. He it was too, who first leant against the absurd, unjust and mischievous refinements which all former judges conceived it fit that they should display, a constant astuteness to defeat the claims of a patentee upon the unreflecting notion of his right being a monopoly, and the public interest being damaged by it, wholly forgetting his genius and labour had been first given to the public in reversion to purchase the temporary possession of that monopoly."

One quality that eminently distinguished Lord Tenterden was the correct, succinct, and appropriate, language in which his statements and decisions were clothed. "In this kind of diction he was surpassed by none, and equalled by few. No doubt his success in expressing his ideas was in part owing to his avoiding all large or venturous matters, and confining himself within limits not difficult, most accurately surveyed and scanned. But within that range his diction was extremely happy."

This logical judge laid down legal propositions with lucid distinctness, and, when called upon to explain or defend a proposition, expressed his opinion in the most simple, yet

appropriate, terms, that could be adopted. The law of libel as it affects publishers, and the reason for the law, were thus clearly enunciated on the trial of Mr. Hansard :

"There is no doubt that by the law of this country, and of all other civilized countries, a printer or bookseller is answerable criminally as well as civilly, for the contents of the books he publishes, no less than the author of them. If indeed the law should be otherwise, reputation, the protection of which is one of the greatest objects of the law, as much as the protection of property, and scarcely less than the protection of life itself, would be wholly unprotected ; for if publishers were not answerable, as the authors are generally unknown, slanders might be circulated to any extent, and on any subject, without any possible means of prevention or punishment."

The doctrine of high treason was explained in this terse sentence upon the trial of Thistlewood :

"The law has wisely provided (because the public safety requires it), that in cases of this kind, which manifestly lead to the most extensive public evil, the intention shall constitute the crime ; but the law has at the same time with equal wisdom provided (because the safety of individuals requires it), that the intention shall be manifested by some act tending towards the accomplishment of the criminal object."

It was the peculiar felicity of Lord Tenterden that he should have been assisted for so many years by puisné judges of rare endowments, and might always have prayed in aid of his doubts the profound knowledge and intense labour of Sir John Bayley, the unerring sagacity of Sir S. Holroyd, and the pleader-taught precision of Sir J. Littledale. Well seconded by these admirable colleagues, he finished off, as it were, the elaborate fabric, "the polished corners of the temple," of our mercantile laws ; and settled on the most solid basis many new and hitherto shifting points in the law of contracts.

One of his very earliest judgments, *Baring v. Corrie*, 2 B. & A. 137, is a leading authority as to the duties and character of factors and brokers, and places on the surest footing the distinction between the two characters, the consequences as to set-off, and the rights of third parties which flow from that distinction.

Another of his later decisions, *Street v. Blay*, 2 B. & Ad.

456, settles the principle of the law on a very nice point, viz. the right of a vendee of any chattels to rescind the sale, and return the goods on the ground of their not corresponding with the warranty.

It was rarely the fortune of the chief to differ in opinion with the rest of the Court, but when these occasions of difference did arise, he enforced his views with equal clearness of reasoning and expression. A remarkable instance of this is given in *Laugher v. Pointer*, 5 B. & C. 547, where the owner of a carriage hired of a stable-keeper a pair of horses to draw it for a day, and the owner of the horses provided a driver, through whose negligent driving an injury was done to a horse belonging to a third person. Abbott, C.J. and Littledale, J., held that the owner of the carriage was not liable to be sued for such injury. Bayley and Holroyd, Js., diss.

"I must own," said the chief justice, "that I cannot perceive any substantial difference between hiring a pair of horses to draw my carriage about London for a day, and hiring them to draw it for a stage on a road I am travelling, the driver being in both cases furnished by the owner of the horses in the usual way; nor can I feel any substantial difference between hiring the horses to draw my own carriage on these occasions, and hiring a carriage with them of their owner. If the temporary use and benefit of the horses will make the hirer answerable, and there be no reasonable distinction between hiring them with, or without, a carriage, must not the person who hires a hackney coach to take him for a mile or other greater or less distance, or for an hour or longer time, be answerable for the conduct of the coachman? Must not the person, who hires a wherry on the Thames, be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked, if any one should affirm the hirer to be answerable in either of these cases."

The whole of this astute argument will well repay the lawyer's diligent study. Nor will he fail to notice the case of *Rennell against the Bishop of London*, 7 B. & C. 113, where the chief justice decided, contrary to the judgment of the rest of the Court, that the personal representative of a prebendary had not the right of presentation, when the prebendary, who had the advowson of a rectory in right of his prebend, died whilst the church was vacant.

Acting on the principle that the law is the perfection of reason, it was the principal study of the chief justice to make his decisions accord with common sense, and substantial justice. A reasonable distinction, a reasonable interpretation of the law, were his favourite phrases. He shrunk from the *reductio ad absurdum*, and abhorred over-curious subtleties. Thus in construing an act of parliament, which Lord Ellenborough had before interpreted, he differed with his predecessor in thinking that an *agreement with intent* to control might possibly not be an *agreement to control*.

He decided, according to his usual good sense, that a combination for the purpose of obtaining, and a combination to obtain, an advance of wages, were the same.

When a learned chancery lawyer argued at length, that a devisee in fee by deed could not disclaim the estate devised, he would scarcely listen with patience to such paradoxical reasoning. The law, he said, is certainly not so absurd as to force a man to take an estate against his will: Mr. J. Ventris expressly states, "that a man cannot have an estate put into him in spite of his teeth:" a remarkable instance, by the way, of the different phraseology used by modern and ancient judges.

He loved to overrule technical objections both in civil and criminal pleading. An indictment, *Rex v. Somerton*, 7 B. & C. 465, had charged that Mary Somerton, being servant on a day named to one Joseph Hellier, on the same day stole his goods. The prisoner being convicted and sentenced to transportation for fourteen years, the record was removed by writ of error. The errors assigned were, that the indictment did not warrant the judgment, as it was not sufficiently alleged, that she was servant, at the time of the committing of the larceny. Lord Tenterden decided against the objection. "If we were to hold that the allegation, that on such a day, the prisoner, being the servant of J. Hellier, did on the same day steal the goods of J. Hellier, did not import that she stole his goods at the time when she was his servant, we should expose ourselves to the reproof expressed by a very learned and very humane judge, that it is a disgrace to the law that criminals should be allowed to escape by nice and captious objections of form."

Cautious to a fault, and little tolerant of innovation as he was, we may well imagine his astonishment, when the Court was moved for a prohibition to the Lord Chancellor sitting in bankruptcy. *Ex parte Cowan*, 3 B. & A. 123.

"We wish not to be understood," said the chief justice, "as giving any sanction to the supposed authority of this Court to direct such a prohibition. It will be time enough to decide the question when it necessarily arises, if ever it shall do so, which is not very probable, as no such question has arisen since the institution of proceedings in bankruptcy, a period little short of 300 years. If ever the question shall arise, the Court, whose assistance may be invoked to correct an excess of jurisdiction in another, will, without doubt, take care not to exceed its own."

In the exercise of a similar prudent reserve, lest he should transgress his authority, Lord Tenterden refused an application by Wooller to compel the benchers of Lincoln's-Inn to permit his call to the bar. 4 B. & C. 658.

"I am of opinion that this Court has no power to compel the benchers of this society to permit any individual to become a member of the society, or to assign any reasons why they do not admit him. It has been argued that every individual has *prima facie* an inchoate right to be a member of one of these societies, for the purpose of qualifying himself to practise as a barrister. It might as well be said, that every individual had an inchoate right to be admitted a member of a college in either of the universities, or of the College of Physicians, or any other establishment of that nature."

A judge so cautious and profound could be rarely in the wrong. With the candour of a great lawyer he displayed a prompt alacrity to admit and correct his errors in the perhaps score of cases in which it might be thought that he had misdirected the jury, or mistaken the bearings of a case at *nisi prius*.

One of the few heresies for which he was condemned by Sir E. Sugden, and which he recanted before his death, consisted in ruling that the jury were warranted in presuming the surrender of a term created in 1782 to attend the inheritance, and never dealt with in any subsequent conveyance till 1819. *Doe v. Hilder*, 2 B. & A. 784. No such presumption had

ever before been made against the owner of the inheritance, and Lord Eldon refused to recognize this novel and dangerous doctrine.

The chief justice laid down another proposition of real property law too decidedly (*Partridge v. Bore*, 5 B. & A. 604), that a mortgagor, in possession of the premises mortgaged, was tenant to the mortgagee, within the strictest definition of that word.

He also confined the rule of professional confidence within too narrow limits. But when we consider the multiplicity and complicated nature of the causes which he had to decide on the instant, our wonder is, not that he sometimes stumbled, but that he was so frequently correct.

All his faculties and energies, to the great hazard both of temper and health, appeared totally absorbed in clearing away the vast accumulation of causes. It was a subject of astonishment, when Lord Ellenborough had a list laid before him at Guildhall of 588 causes entered for trial. Under the aching sight of his successor there sprung up the vast array of 850. The average number, which in the comparatively easy times of Lord Mansfield scarcely ever reached 200, and when Lord Kenyon was chief justice fluctuated between 200 and 300, expanded in Lord Tenterden's time to 600, and sometimes 800! Hence arose his eagerness to cut off all the fringes of rhetoric—his occasional outbreaks of temper—his asperity to counsel who ventured to prolong a discussion, which the judge might think superfluous, but which the client and his advocate deemed of paramount importance.

The mortified exclamation which sometimes escaped him, when a third counsel rose, "What another!" was made in a tone the least mild and encouraging, that could well be imagined for a young beginner. When a chancery barrister argued some issue from that Court relating to outstanding terms, in which the length of his argument threatened to bear too exact a proportion to the period for which the term had been created, the impatient chief justice broke in—"Human patience may bear this, but mine cannot." No one assented more heartily to the truth of Mr. Justice Taunton's saying, that tenuity weakens strength; no one counted the minutes on the clock and the slow progress in business with more anxiety.

"He never," writes Lord Brougham, "could endure the 'trick' of the bar as displayed in its leading advocates; nor was there any great harm in this, had it stopt here. But he seemed always to suppose that an address to a jury could be framed on the model of a special plea, or the counts of a declaration, only without the prolixity and repetition habitual with special pleaders, and to forget that the surest way of bringing out the truth in any case is to let the conflicting feelings and interests of parties come into their natural collision. His impatience was thus very manifest, and, had his nerves been in the same proportion firm, as his dislike to declamation and illustration was strong, a struggle would have ensued, in which the eloquence of the bar would either have been extinguished, or have silenced and discomfited the bench. In like manner, when, during the interlocutory discussions with the counsel, whether in motions in banc, or on objections taken before him at *nisi prius*, he was uneasy, impatient, and indeed irascible, at nothing so much, as at cases put by way of trying what the court had flung out. Being wholly void of imagination to supply cases in reply, and even without much quickness to sift the application of those put, he often lost his temper, and always treated the topic as an offence. But it was chiefly in obstructing cross-examination, which he wholly undervalued from his utter incapability of performing his part in it, that his pleader-like habits broke out. Had he been submitted to in this matter, cross-examination would have been only known as a matter of legal history. His constant course was to stop the counsel by reminding him that the witness had already said so, or had already sworn the contrary, and this before the question was answered; to which it was natural, and indeed became usual, for the counsel to make answer, that this was the very reason why the question had been asked, the object being, either to try the witness's memory, or to test his honesty."

It must be confessed that, in compelling despatch, the impatient, because overburdened, judge was too apt to mistake asperity for energy, and to chide with harshness, when a slight admonition, or dignified rebuke would have sufficed. "I do not like," said the late Mr. Curran, when Master of the Rolls, in one of his apt metaphors, "to appear in the

character of a drill serjeant with my cane rapping the knuckles of a private, when I become a colonel from the ranks."

The causticity of the chief sometimes expressed itself in all the terseness of epigram, and led to dramatic scenes with the antagonist and offending counsel.

When Mr. Brougham opened an action for the amount of a wager laid upon a dog fight, which, through some unwillingness of dogs or men, had not been brought to an issue "We, my lord," said the advocate, "were minded that the dogs should fight." "Then I," replied the judge, "am minded to hear no more of it! Call the next cause."

One day in banc a learned gentleman, who had lectured on the law, and was too much addicted to oratory, came to argue a special demurrer. "My client's opponent," said the figurative advocate, "worked like a mole under ground clam et secretè." His figures and law Latin only elicited an indignant grunt from the chief justice. "It is asserted in Aristotle's Rhetoric"—"I don't want to hear what is asserted in Aristotle's Rhetoric," interposed Lord Tenterden. The advocate shifted his ground and took up, as he thought, a safe position. "It is laid down in the Pandects of Justinian"—"Where are you got now?" "It is a principle of the civil law"—"Oh, Sir!" exclaimed the judge, with a tone and voice, which, to a punster's ear, would have abundantly justified his assertion, "we have nothing to do with the civil law in this court."

In a similar testy mood, when a serjeant had taken up time, as he thought, unnecessarily, and asked, among other dodging questions, if witness had not seen the gentleman drive off in a yellow chaise, the judge inquired sneeringly, whether his brother would not like to know the colour of the post-boy's jacket?

His rebukes on a classical blunder were administered with less severity. A libeller had introduced the hackneyed line from Virgil—"Timeo Danaos et dona ferentes." The pleader who drew the declaration, in translating this line, had rendered it, "and those bearing gifts." An objection was taken to this mistranslation on special demurrer, but the chief contented himself with the quiet sarcasm, "It was

not so translated when I was a young man." The provocation was certainly as great as that which startled Lord Mansfield from his amenity, when the counsel pronounced the second syllable of *jamdudum* short.

The witty reproof of a living judge, addressed to a barrister, who, with a still more startling contempt of prosody, talked of a *nolle prosequi* on the last day of term, "That he ought not on that day to lengthen things unnecessarily," was alien from Lord Tenterden's temperament, who could not disport himself in court.

This severity, partly the result of over labour, and partly of disease, communicated its character to his handsome and majestic features in latter days. Sallow and care-worn, they seemed to borrow the expression of the lion in the royal arms, on the tapestry which hung behind him. With determined manner he frowned down the forlorn attempt at raising useless or idle quibbles, and harshly stopped all unnecessary speech.

But, though he thus contrived to keep the bar in admirable discipline, he was not free from the weakness of favouritism, and he listened to those in the front or back benches with a very different expression of countenance and manner. One counsel, the present Chief Baron of the Exchequer, had especially the ear of the court, but for this evident partiality he was indebted to his own excellent tact in saving time, by never pressing a case unnecessarily, and by always knowing the exact point where to yield. The jealous sense which the bar evinced of this partiality, was well expressed by Mr. Adolphus. The favourite having remarked sarcastically, "There is a difference between the practice here, and at the Old Bailey;" his antagonist retorted, "I know there is. There the judge rules the advocate: here the advocate rules the judge."

This acute and dexterous lawyer used to confirm his pre-audience by well timed delicate flattery. Having moved for a new trial on the ground of misdirection, he prefaced his motion with an explanatory remark that he had taken an accurate note of the summing up, which he only did when he conceived there was a misconception on the part of the judge, which did not happen with regard to his lordship three times

a year. The chief justice was evidently gratified, and observed with a smile, "I fear, Mr. Scarlett, that you do not take notes as often as you ought to do."

Lord Tenterden, we are assured, showed no little variety of firmness and of temper on different occasions, and towards different persons. Of him it might be said that he had a different measure of patience and courtesy for different classes, even for different individuals. It could not be said of him, that he was no respecter of persons. The bar felt this somewhat, the witness felt it more, the parties never felt it at all. Its scope was confined to the mere accident of outward behaviour and manners—nothing beyond. When on one occasion he had, with some roughness, addressed to a witness, who was looking another way, an advice, not unusual with him, and not very delicately couched, "To hold up his head and speak out like a man," it was amusing to observe the fall of both countenance and voice, when the witness turned upon the judge the face of the Chairman of the Honourable East India Company!

Witnesses of less consideration, who spoke in tones not sufficiently loud, or used terms of circumlocution and betrayed trickery and deceit, were chid in accents of severity, sometimes commensurate with, but more frequently greater than, the provocation. At a trial at *Nisi Prius*, a surgeon was asked if he would have prescribed the same as Dr. Edwards. He looked at the prescription and replied "I should have prescribed diametrically opposite. I should consider that prescribed by Dr. Edwards as adding weight to a porter's back." Abbot, C. J., corrected the flippancy of the witness with much propriety. "Don't speak metaphorically; you are speaking just now of a gentleman of experience and respectability. I don't wish you to conceal your opinion, but only to speak it in different language."

Direct, penetrating, caustic, the chief justice was impatient of any thing circuitous or evasive; he detected vanity in its most secret lurking places and penetrated every disguise. All felt his lash: the priggish haberdasher, who talked of the warehouse instead of the shop; the conceited attorney, who, by a vulgar error deeming the term more honourable, described himself as solicitor; the pedantic surgeon, who could not speak

plain English, or answer the most simple question intelligibly. The judge would have a direct reply, and, according to the amusing anecdote recorded in the *Quarterly Review*, carried his determination into the society of private life:

"He had contracted so strict and inveterate an habit of keeping himself and everybody else to the precise matter in hand, that once, during a circuit dinner, having asked a county magistrate if he would take venison, and receiving what he deemed an evasive reply somewhat to the following effect: 'Thank you, my lord, I am going to take boiled chicken;' his lordship sharply retorted, 'That, sir, is no answer to my question, I ask you again if you will take venison, and I will trouble you to say yes or no without further prevarication!'"

His nice sense of justice kept in check any undue display of rigour towards defendants. He tried Hone with singular temper, and was even charged with displaying more gentleness to the accused than was agreeable to the boisterous Lord Ellenborough, who rose from a sick bed to compel a verdict of guilty.

But though tolerant, Lord Tenterden could rebuke a defendant who exceeded the bounds of license, with extreme bitterness. When Carlile complained on some point being ruled against him, that he would have met with more justice in a Turkish court, "More summary justice undoubtedly," replied his lordship, "for the bow-string would have been round your neck an hour ago."

His severity to libellers may be accounted for, and in part justified, by his respect for authority, his abhorrence of all unjust attacks on character, and strict love of truth. In making absolute a rule for a criminal information against Mr. Whittle Harvey, who had written in his newspaper, "We speak from authority, that the malady under which his Majesty labours is of an alarming description," the judge remarked:

"If any writer thinks proper to say, that he speaks from authority, when he informs his readers of a particular fact, and it shall turn out that the fact so asserted is untrue, I am of opinion that he, who makes the assertion in such a form, may be justly said to make a false assertion. I am not a sufficient casuist to say, that, to call it an untrue assertion, would be a more proper mode of expression."

His stubborn regard for truth resembled that of George III. when he expressed his repugnance of Lord Chesterfield's subtle distinction between simulation and dissimulation. "This may be all very deep and clever, but I like more straightforward work."

In his hatred of seditious libels Lord Tenterden may have sometimes pushed the rigour of the law too far. The principle advanced in *Rex v. Burdett*, 4 B. & A. 159, admits of question. "The composition of a treasonable paper intended for publication has on more than one occasion been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing upon the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published."

But all who peruse that admirable argument, even whilst they dissent from some of the positions laid down, cannot fail to admire the singular clearness and force of his remarks on the doctrine of presumption, and the classical beauties of his style.

Though too forbearing and cautious himself to fine even a seditious libeller for contempt, when in the course of his defence addressing unwarrantable remarks to the jury, Lord Tenterden upheld the more intrepid discretion of a brother judge, who had mulcted a defendant in £20 for saying on a threat to restrain him: "My Lord, if you have your dungeon ready, I will give you the key;" and again £40 for his cool impudence in asserting "the bishops are generally sceptics." Whilst refusing the rule for a new trial, *Rex v. Davison*, 4 B. & A. 433, the chief justice warmly defended the exercise of that power, which was vested in the judges for the protection of the public, and which Mr. Justice Best had exerted:

"I quite agree that this power, more especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and moderation. But if the publication of blasphemy and irreligion cannot in any other way be prevented, in my opinion a judge will betray his trust, who does not put it in force. An allusion has been made to my own personal conduct on a former occasion (Carlile's trial). I have often doubted whether I did not in that case permit too much to be done, but I thought then that it was

better to err on the side of forbearance. The question here is, if a judge sitting at *Nisi Prius* has power to impose a fine on a defendant for a contempt. That he has power to do so, I can entertain no doubt; no lawyer can doubt the power of every court to fine for contempt. As to the particular occasion on which these fines were imposed, I disclaim any right to judge of it, but I should be wanting to myself and to my feelings, as well as my duty to others, if I did not say that, in the view that I have taken of this case, it is most manifest that the defendant came into court with an express design to revile the Christian religion. It became the duty of the judge to prevent him from so doing by the imposition of a fine, when he found that remonstrance had not that effect."

In exact proportion to his dislike of libellers was Lord Tenterden's warm attachment to that valuable body of English gentlemen, the unsalaried county magistracy. To that class of persons, he said, the nation is most peculiarly indebted for valuable and gratuitous services, and no man can have the good of his country at heart who seeks to displace them.

When a criminal information was moved against a Lancashire magistrate, *Rex v. Borron*, 3 B. & A. 433, for refusing to investigate a charge against some other magistrates for acts done in another part of the county, Lord Tenterden directed the rule to be discharged with costs, and the costs to be paid by the attorney.

"The application is made against a gentleman, who is one of that class, to whom this country is under as great obligations as this, or any other, nation is, or ever was, to any members of its community. To punish as a criminal any person, who, in the gratuitous exercise of a public trust, may have fallen into error or mistake, belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom."

Heartily concurring in the justice of this decision, we may yet be permitted to question the propriety of some other judgments in cases relating to the magistracy, one or two of which we have noted as interesting in themselves, and marking the character of his mind.

A rule had been obtained against a clerical magistrate, the Rev. Mr. Broughton, for having illegally, corruptly, and oppressively conducted himself in committing to prison two chil-

dren, a brother and sister, of the ages of ten and seven. He had committed them on the charge of stealing two ducks, which were swimming in a pool on the common, and which they wanted to make fight. Lord Tenterden discharged the rule on payment of costs, as there was not enough to fix on the justice the imputation of having acted from corrupt and malicious motives, but added a severe rebuke :

"Certainly considering the age, and the circumstances under which these children were brought before him, a discreet and commonly humane man might reasonably be induced to pause, before he committed such tender infants to a common gaol. There was another part of the conduct of this gentleman, which the court could not too strongly reprobate, viz. that of having taken the deposition of Barlow, the prosecutor, in privacy, behind the back of the persons accused."

The children's father afterwards recovered £100 damages against Barlow; and we think too highly of the body to which this cruel magistrate belonged, to believe they would have felt aggrieved, had the Queen's Bench unsheathed the sword of justice against him.

The chief was with much difficulty persuaded, upon another occasion, to grant a mandamus commanding certain magistrates of Devon to renew the license of a public house within their division. They had refused to renew it for a reason in law palpably absurd, because the sign of the house had been thrown down, and was in the hands of the painter to repair. On the suggestion of Holroyd, J., for a mandamus to hear and determine, Lord Tenterden said, "You may take a rule and see what you can do with it. If the magistrates are disposed to review their decision, on being given to understand they have mistaken the law, they can be informed of that fact on very good authority, without the interference of this Court. I am unwilling to grant a rule in any case, in which I am not satisfied that this Court has the power to do that, which the rule seeks to obtain."

Notwithstanding this constant and sometimes excessive protection, though this incorrupt judge ever held the shield of the law before magistrates when assailed, and covered them with the robes of justice, he was wholly innocent of all interested motives, and acted as their protector from the purest

dictates of patriotism. Some prejudice may have been blended with his high Tory principles, but he maintained his opinions consistently to the last without any respect to personal aggrandizement.

So far from studying his own advantage, Chief Justice Abbott never asked a political favour during the ten years that his friend Lord Eldon continued to hold the seals, and partly from his own indifference and partly from the Chancellor's aversion for legal peerages, did not even obtain that rank to which his station entitled him. It was only in 1827, when the new ministry thought proper to introduce into the House of Lords two other eminent members of the law, Lord Lyndhurst and Lord Plunkett, that Mr. Canning, the Premier, in a few beautiful words of high acknowledgment of the merits of the chief justice, offered him a peerage in his majesty's name, as due to the exalted office he filled, and the exemplary manner in which he had discharged its duties. He was accordingly raised to the peerage by the title of Baron Tenterden, the name of a town in his native county, Kent, to which, from early associations, he was particularly attached.

The new Baron was introduced into the House on the 2nd of May, 1827, by Lords Bexley and Kenyon, and followed to the bar, as a token of their respect, by a large proportion of the counsel who practised in his Court. His débüt as a speaker was in support of Miss Turner's Divorce Bill, which he warmly advocated on the ground of doing substantial justice, denouncing the conspiracy by which that unfortunate young lady had been purloined from school, as one that had originated in the basest motives of lucre, and had been conducted by force and fraud. "Their lordships," he urged with the full assent of his hearers, "should teach such conspirators there was a power in the legislature to prevent them from reaping any fruit from their crimes."

Siding heart and voice with the Tory party, he withstood manfully, but without success, those measures of liberal concession, as they were termed, which from the period of his entering parliament began so thoroughly to colour their sayings and acts. Resolute against the passing of the Corporation and Test Act Repeal Bill, he proposed, as a measure of

the last resource, that the chief magistrate in all corporate towns should make the following declaration:—"I entertain no opinion on the subject of religion, which can, or may, prevent me from attending the morning and evening service of the Church of England as set forth in the Book of Common Prayer." In an amendment so distasteful to the Dissenters generally, the chief justice met with very slight concurrence, the Contents being 22, Non-contents 111.

Against the Roman Catholic Relief Bill, Lord Tenterden, though not an orator, spoke with great ability, and was listened to with marked silence and respect. He denied in a spirit of prophecy that this measure would satisfy the Catholics. "Nothing would follow from it but a delusive and temporary calm—nothing but that fatal stilness which was the certain indication of an approaching storm. Parliament would in future have to struggle against a combination of physical and political power." When Dr. Lloyd, then Bishop of Oxford, startled the Lords with his declaration, "I agree that every idolater must be guilty of idolatry before his God. I do not believe the Roman Catholics are so, and I will not asperse those from whom I differ," adding, "None but a tyro in logic could draw the conclusion that idolatry and idolatrous meant the same thing,"—Lord Tenterden, who detested sophistry, retorted with much warmth, "It is now forty years since I was a tyro either in logic or grammar, and I may perhaps have forgotten the very elements of the science; yet I beg leave to say, that I have learnt nothing since, which enables me to distinguish, that a superstitious act is not superstition, or an idolatrous act is not idolatry."

The excess of his judicial labours, which allowed no respite either in Court or out of it, caused the chief justice during the next two years of doubt and difficulty, "with fear of change, perplexing nations," to intermit in a great measure his attendance in the House of Lords. But when the Reform Bill hung as a heavy cloud on the destinies of the nation, Lord Tenterden returned to record his protest against a measure, which went to invest all the power of the state in the Lower House of Parliament, which would leave nothing for the Lords but to obey the dictation of the Commons and register their edicts. "Never (said the noble lord in a tone of in-

dignant vehemence), never shall I enter the doors of this house after it has become the phantom of its departed greatness." His sentiments were delivered with such clearness, and bore upon them such an impress of sincerity, that the Bishop of Rochester declared he thought the speech of the chief justice the most impressive, and convincing, that had been delivered on their side of the question; a high compliment to his power, as all the peers, the most renowned for eloquence, had spoken.

Whilst Lord Tenterden, with a reserve becoming his high station, abstained from party conflicts, and only spoke on occasions of enduring interest, he took an active part in the task of legislation, and contributed all the stores of his cautious wisdom, and legal acumen, to the amendment of the laws. Adopting in part, and improving, the recommendations of the Common Law and Real Property Commissioners, he has frequently stamped his name upon our statute book as a legal reformer. The most salutary of his well-studied and carefully prepared acts are the 9 Geo. IV. c. 14, For the Alteration of the Law as to the Limitation of Actions; 9 Geo. IV. c. 15, To prevent a failure of Justice by reason of Variances between Records and Writings produced in Evidence; 1 Will. IV. c. 3, and 1 Will. IV. c. 21, Mandamus and Prohibition Acts; 1 Will. IV. c. 22, Interrogatories Act; 1 & 2 Will. IV. c. 58, Interpleader Act; 2 & 3 Will. IV. c. 39, Uniformity of Process Act; 2 & 3 Will. IV. c. 71, Prescription Acts. Another most useful statute for the limitation of actions, 3 & 4 Will. IV. c. 27, prepared under his sanction, has swept away indiscriminately between fifty and sixty different species of actions, the fertile source of difficulty and confusion.

The faithful friend of the chief justice has proved by an authentic record (his own letter) how diligently he strained all his energies to the task of reformation, at how much private cost he laboured for Sir Edward Coke's benediction, Blessed be the amending hand!

"In 1830," writes Sir Egerton Brydges, "the two months following the summer circuit, almost the only period of relaxation throughout the year, were devoted by this distinguished man to the preparation of measures of this kind, as appears by a letter which I received from him in the September of

that year:—"You are probably aware that we had three commissions, one on the practice and proceedings of the superior Courts of Common Law, another on the Law of Real Property, and a third on the Ecclesiastical Courts. Two reports have been made by each of the two first, none by the latter, of which I am a member. The reports contain recommendations and proposals for many alterations, some of which I think useful and practicable. Something however must be done by the legislature to satisfy the public mind, and, under this impression, I have employed myself, since the circuit, in preparing no fewer than five bills, intended chiefly to give some further powers to the common law Courts, and make some alterations in the practice, but without infringing on any important principle, adopting some of the recommendations with some alterations from the proposals. I wish it were possible to cure the evil you so justly complain of. Whatever shortens and simplifies will be calculated to save expense, but acts of parliament cannot make men honest. I doubt whether an act to subject bills for conveyancing to taxation would effect much, as I think they ought to be. I would willingly promote such an act, but if I bring my five bills before parliament, I shall have done at least as much as I ought to do, and perhaps more, though, to say the truth, I have one more bill on the anvil, and have had for at least three years without courage to propose it. It has had much of the *limæ* labor. Indeed, to say the truth, this *limæ* labor is an occupation by no means disagreeable to my mind."

His long vacation, the sacred month of the lawyer, was, however, in general solaced by still more congenial recreations and repose. As the virtuous Fearn turned to chymical pursuits for what he called his dissipations, this severely tasked judge took up botany to occupy his leisure hours, and wrote some elegant Latin poems on flowers and plants. He read poetry, especially the classics, with great feeling and taste; but he had neither sympathy nor patience for the modern school. His apology to Sir Egerton Brydges for condescending to trifle in the regions of Latin metre is highly characteristic:

"I have always felt that it might be said that a chief justice and a peer might employ his leisure hours better than in

writing nonsense verses about flowers. But I must tell you how this fancy of recommencing to hammer Latin metres after a cessation of more than thirty years began. Brougham procured for me from Lord Grenville a copy of some poems printed by him under the title of 'Nugæ,' chiefly his own, one or two, I believe, of Lord Wellesley's, written long ago, and a piece of very good Greek humour by Lord Holland. The motto in the title-page is four or five hendæcasyllabic lines by Fabricius. At the same time John Williams of the Northern Circuit, now the Queen's solicitor-general (at present one of the puisné judges of the Queen's Bench), who is an admirable scholar, sent me four or five Greek epigrams of his own. I had a mind to thank each of them, and found I could do so with great ease to myself in ten hendæcasyllables. This led me to compose two trifles in the same metre on two favourite flowers, and afterwards some others, now I think twelve, in all, in different Horatian metres, and one, an Ovidian epistle, of which the subject is the Forget-me-Not. One of the earliest is an ode on the conservatory in the Alcaic metre, of which the last stanza contains the true cause, and excuse of the whole, and this I will now transcribe :

'Sit fabulosis fas mihi cantibus
 Lenire curas ! sit mihi floribus
 Mulcere me fassum, senemque
 Carpere quos juvenis solebam.'

" You see I am now on my hobby, and you must be patient while I take a short ride. Another of the earliest is an ode in the Sapphic metre on the *Convallaria Maialis*, The Lily of the Valley. I am a great admirer of Linnæus, and my verses contain many allusions to his system, not, however, I trust quite so luscious as Darwin's *Loves of the Plants*, which, I believe, were soon forgotten. I have not seen the book for many years. I have one little ode written in the present year on a plant called the *Linnæa Borealis*, which, Sir J. Smith tells us, was a name given to it from its supposed resemblance to the obscurity of the early days of the great botanist. It is not common and possesses no particular attraction ; Smith says it has sometimes been found on the Scottish mountains, and I have a plant sent to me last spring by Dr. Williams. I will send you a copy of this also. You must give me credit for

the botanical correctness of the first part, of the rest you can judge, and you may criticize as much as you please. There are three other metres of Horace on which I should like to write something, but what, or when, I know not. It is now high time to quit this subject."

The poem which follows is remarkably elegant and correct, worthy of a place by the side of Cowper's favourite Vinny Bourne. It is pleasant to see the mind of the chief justice in his old age thus cheered and refreshed by classical associations, to witness such a practical refutation of the disheartening theory, that a deep study of the law extinguishes all poetical feeling,—that a lawyer's mind is a barren ring, when once preoccupied with cases,—that, according to Cowley's beautiful image :

"Where once such fairies dance, no grass doth ever grow."

The following letters, written by the aged peer to his steadfast friend, relate to themes of a more prosaic character, and are strongly symptomatic of carking care, of infirmity and decay.

"RUSSELL SQUARE, May 20th 1832.

"MY DEAR SIR EGERTON,

"I have made several attempts to write to you, but have found myself unable to do so; nor can I now write as I ought and wish to do. My spirit is so depressed that, when I am not strongly excited by some present object that admits of no delay, I sink into something very nearly approaching to torpidity. My affection for you remains unchanged. God bless you. Your most affectionate friend."

In another letter dated June 8th, 1832, in answer to some improvement of the law, proposed to be adopted by Sir Egerton from the Code Napoleon, he writes: "I am sure it never would be adopted without the sanction and efforts of the ministry, or, in future times, of those, who, through a nominal ministry and a nominal king will be the real governors of the state. A bill for settling disputes by arbitration under the authority of a judge, introduced into the House of Lords, on the recommendation of the commissioners relating to the courts of common law, has now been for some months before the House of Commons, being sent from the House of Lords. It was sent

there twice before, and died a natural death by prorogation, or dissolution, and, from all I hear, is likely to die in the same way this third time, though I have now removed all objections by confining the power of the judge and court, not merely to cross demands of more than two items on each side, as before, but to the cases wherein one of the parties desired such reference. But it seems this will not satisfy some persons, and I am told that it cannot be brought before a committee till after midnight, and whenever it has been so brought on, an opponent desires the House to be counted, and the requisite number of members are never found to be present. Another bill introduced by me on the same recommendation, being uniformity of process in the several courts of law at Westminster, found no opponent in the Commons, passed very glibly through its several stages, and has received the royal assent. I have two more bills now in the Lords, which passed, and went to the Commons last session as one bill, and there died a natural death. The same thing will probably happen this session, and should it be so, I must think I have received a sufficient admonition to interfere no farther in such matters. We differ upon the great measure that has so long agitated the country. I consider the Catholic Bill as the first, and this as the second step to overturn all the institutions of the country. In my anticipations of the effect of the first I have certainly not been mistaken. The present state of Ireland proves this. Would to God I may be mistaken in the effect of the Reform Bill. Great alarm was felt yesterday from the accounts of a proceeding at Paris as published in the Times. I learn to day that this has subsided, and that the government prevailed in the conflict. I have no confidence in a temporary triumph over a principle that, I believe, was never subdued, and can only be restrained by unintermitting coercion."

The following letter was written a fortnight before the death it so clearly heralded:

"MY DEAR SIR EGERTON,

"I came to town yesterday to attend his majesty on the recorder's report, and have received your letter this morning. I have lately suffered and am still suffering very severely from an internal complaint, which they call an irritation of the mu-

cous membrane. It troubled me during all the circuit. I got rid of it for a short time at Leamington, but it soon returned with greater violence, and has for some time deprived me of appetite, and produced great depression of spirits. Sir Henry Halford, however, assures me that a medicine he has ordered me will in time remove the complaint, and my confidence in him induces me to trust it may be so, though after a trial of six days I cannot say that I find any sensible improvement. God bless you.

“Your most affectionate friend.”

We admire the saying of a veteran in the profession, that he would die like a camel in the wilderness, with his burden on his back. Lord Tenterden acted to the last upon the spirit of this declaration. Notwithstanding his infirm health, he presided over the trial at bar of the Mayor of Bristol for misconduct at the riots, and sat out the first two days of that protracted and important trial. On the third day a violent attack of inflammation confined him to his bed, from which he never rose. The united skill of Sir Henry Halford, Dr. Holland and Mr. Brodie, were baffled by the strength of the disease, and on the morning of Sunday, November 4, 1832, this venerable judge expired.

The funeral was strictly private, in accordance with his express desire. Low minded in his high estate, he deprecated the empty ceremonial of a long procession “blackening all the way,” and a gorgeous monument. Two epithets, most honourable to humanity, may be graven on his tombstone—the humble and the just. He has left a name in the profession that will not die, and many lawyers, we may rest assured, will derive encouragement under difficulties, and fortitude to persevere, from the career of the hair-dresser’s son.

His remains were interred in the vaults of the Foundling Hospital, of which institution he had been a governor.

T.

A short but masterly sketch of Lord Tenterden’s judicial character, from the pen of Mr. Serjeant Talfourd, appeared in the 9th vol. (p. 234) of this work,—
Edit.

ART. III.—THE INTERNATIONAL LAW OF THE SLAVE TRADE,
AND THE MARITIME RIGHT OF SEARCH.

THE prize law looks primarily to violations of belligerent rights as grounds of confiscation, in respect of vessels not actually belonging to the enemy; yet any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the belligerent rights of that country whose tribunals are called upon to consider it, may subject the vessel employed in that trade to confiscation. Thus, in the case of the *Amedie*,¹ which was that of an American (neutral) ship employed in the slave trade at the time of capture, Sir William Grant, M. R., said:

“ In all former cases of this kind, which have come before this Court, the slave trade was liable to considerations very different from those which belong to it now. It had, at that time, been prohibited (as far as respected carrying slaves to the colonies of foreign nations) by America; but by our own laws it was still allowed. It appeared to us therefore difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign state of which this Court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think as individuals before, we could not, sitting as judges in a British court of justice, regard the trade in that light, while our own laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate existence. When I say abstractedly speaking, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade, but we have now a right to affirm that *primâ facie* the trade is illegal, and thus to throw on claimants the burthen of proof that, with respect to them, by the authority of their own laws, it is otherwise. As the case now stands, we think

¹ 1 Dodson, 84, note; and 1 Acton, 240; 2 Acton, 1, 4, 6.

we are entitled to say, that a claimant can have no right, upon the principles of universal law, to claim the restitution, in a prize court, of human beings carried as his slaves. He must show some right that has been violated by the capture, some property of which he has been deprived, and to which he ought to be restored. In this case, the laws of the claimant's country allow of no right of property, such as he claims. There can therefore be no right of restitution."

It matters not in what stage of the trade the ship is captured, whether in the inception, prosecution, or consummation;¹ and the Court will narrowly examine into the title of the ship; and where the colorable owner of the ship is the asserted owner of the cargo, its confiscation will follow the fate of the ship, with which it is involved in one common fraud.² But in the absence of collusion, the Courts of this country will respect the property of foreigners, engaged in the slave trade under the sanction of their own country; and an indorsement upon the pass, signed by the foreign colonial governor, that "the vessel was bound to the coast of Guinea for slaves," raises a presumption of the foreign legality of the trade, and shifts the burthen of proof from the claimant to the captor.³

The instructions, annexed to the convention with Portugal, embodied in 5 Geo. IV. c. 113, imply that the seizures of Portuguese slave ships are to be made under the personal direction of the commander of a ship of war. Therefore a seizure by an open boat (the crew of which was borne on the books of a king's ship) commanded by an officer of the rank required to make the search, but actually putting off from an unauthorized tender, and at a distance of 1500 miles from the king's ship, did not entitle the ship to the moiety of the proceeds, or to the bounties under 5 Geo. IV. c. 113, ss. 67, 68, although the slave ship had been condemned by the competent Court as a prize to a tender to a king's ship.⁴

The slave trade is not piracy,⁵ nor any crime, by the universal law of nations; and therefore a French ship, employed

¹ 1 Dodson, 86; Stewart, 284.

² 1 Dodson, 91; *à fortiori* where the cargo belongs to the concealed owner, Stewart, 205.

³ 1 Dodson, 95.

⁴ 2 Haggard, 366.

⁵ It is made so in a British subject by 5 Geo. IV. cc. 17 and 113.

in the slave trade before there was an actual abolition of that trade by the French law, might forcibly resist the search of our king's cruisers; for the rights of foreigners are not affected by British acts of parliament, or any commission founded on them, if inconsistent with the law of nations;¹ and a foreigner, not prohibited from carrying on the slave trade by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure by a British subject of a cargo of slaves, on board of a ship then employed by him in carrying on the African slave trade.² But a claim founded on any act, which in the general estimation of mankind is held to be illegal and immoral, as piracy, may be rejected in any court on that ground alone: its general injustice may be subject of cognizance in any municipal court.³

Foreign slave vessels cannot be detained or searched at sea except for violation of treaty, and then only by such of her majesty's ships of war as are provided with special instructions for that purpose; nor can the search of any such foreign slave vessel be made by any officer holding a rank inferior to that of lieutenant in the navy of Great Britain. With respect to these seizures of foreign slave vessels, the admiralty courts have no jurisdiction. The only tribunals which can legally adjudicate thereon, are the "Mixed Commission Courts," established in pursuance of treaties with certain foreign powers. An exception has been made by the statute 2 & 3 Vict. c. 78, in the case of Portuguese slave traders and such as are not entitled to the flag of any state. These are placed within the jurisdiction of the admiralty courts, like British-owned ships found engaged in the slave trade. When a vessel engaged in the slave trade is seized for a violation of the municipal law of the united kingdom of Great Britain and Ireland, it is the duty of the captor to send her with the slaves on board (if any) for the purpose of adjudication to the nearest and most convenient port in any colony or settlement, where there is a vice admiralty court.⁴

¹ 2 Dodson, 210, 238; 1 Haggard, 265.

² 3 Barn. & Ald. 353.

³ 1 Dodson, 100.

⁴ Rules and Regulations, s. 25, under 2 Will. IV. c. 51; and see 5 Geo. IV. c. 113.

In the famous case of the *Maria*,¹ Lord Stowell laid down the following, among other, principles of the law of nations, as incontrovertible :

“ 3dly. That the penalty for the violent contravention of this right of search is the confiscation of the property, so withheld from visitation and search. For the proof of this, I need only refer to Vattel, one of the most correct, and certainly not the least indulgent, of modern professors of public law. In book III. c. vii. s. 114, he expresses himself thus: ‘ On ne peut empêcher le transport des effets de contrebande, si l’on ne visite pas les vaisseaux neutres, que l’on rencontre en mer. On est donc en droit de les visiter. Quelques nations puissantes ont refusé, en différents tems, de se soumettre à cette visite. Aujourd’hui un vaisseau neutre, qui refuserait de souffrir la visite, se ferait condamner par cela seul, comme étant de bonne prise.’² Vattel is here to be considered not as a lawyer, merely delivering an opinion, but as a witness asserting the fact, that such is the existing practice of modern Europe. And, to be sure, the only marvel in the case is, that he should mention it as a law merely modern, when it is remembered that it is a principle not only of the civil law (on which great part of the law of nations is founded) but of the private jurisprudence of most countries of Europe—that a contumacious refusal to submit to fair inquiry infers all the penalties of convicted guilt. Conformably to this principle, we find, in the celebrated French Ordinance of 1681, now in force, art. 12, ‘ That every vessel shall be good prize in case of resistance and combat;’ and Valin, in his smaller commentary, p. 81, says expressly that although the phrase is in the conjunctive, yet that the resistance alone is sufficient.³ He refers to the Spanish Ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, ‘ in case of resistance *or* combat.’ And recent instances are at hand, and within view, in which it appears that Spain continues to act upon this

¹ 1 Rob. 340, affirmed on appeal, 4 Rob. 410.

² See also Bynkershoek, lib. i. c. 14; Valin, *tit. des Prises*, art. 11, p. 270.

³ In some of the treaties of France this article is expressly inserted in the disjunctive. *Vide* treaties between France and the Duchy of Mecklenburg, art. 18, anno 1779. Marten’s Treat. vol. ii. p. 40. Also between France and Hamburg, anno 1769.

principle.¹ The first time in which it occurs to my notice, on the inquiries I have been able to make in the institutes of our own country, respecting matters of this nature, excepting what occurs in the Black Book of the Admiralty,² is in the Order in Council, 1664, art. 12, which directs that 'when any ship, met withal by the royal navy, or other ship commissioned, shall fight or make resistance, the said ship and goods shall be adjudged lawful prize.' A similar article occurs in the proclamation of 1672. I am aware that in those orders and proclamations are to be found some articles not very consistent with the law of nations, as understood now, or indeed at that time, for they are expressly censured by Lord Clarendon.³ But the article I refer to is not one of those he reprehends, and it is observable that Sir Robert Wiseman, then the king's advocate-general, who reported upon the articles in 1673, and expressed a disapprobation of some of them, as harsh and novel, does not mark this article with any observation of censure. I am therefore warranted in saying that it was the rule, and the undisputed rule, of the British Admiralty. I will not say that that rule may not have been broken in upon in some instances by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a state may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having in no case any other right and title than what the state itself would possess under the same facts of capture. But I stand with confidence upon all fair principles of reason—upon the distinct authority of Vattel—upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruizer, is followed by the legal consequence of confiscation.

¹ "They acted upon this principle in the case of the ship *Thetis*, which was the subject of the case of *Saloucci v. Johnson*, B. R. Hil. 25 Geo. III. to which perhaps, the learned judge alluded." *Marsh, Insurance*, 448.

² B. 7 & 8.

³ *Life of Lord Clarendon*, p. 242.

This is what I pronounce judicially on this case, after weighing with the most anxious care the several facts, and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself. I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed."¹

So in a case ² in which the master of a neutral (American) ship alleged instructions from his employers, directing him not to speak to any belligerent (British) cruisers, Lord Stowell said, "If these instructions are to be taken in their full extent, as authorizing the masters of American ships to fly from British cruisers, it is a practice which will (I venture to say) be attended with very great inconvenience to American navigation. It must be understood that every commissioned cruiser has an undoubted right of inquiry, and it is not the arbitrary decrees of the other belligerent that can abrogate it. On strict principle, to defeat that right by evasion might be as penal as to resist it by force, though it has not been so held in practice :³ but certainly it is conduct which is always to be viewed with jealousy, and cannot be set up as an excuse advantageous to the parties in any matter requiring explanation of their conduct.

"The crew of a neutral vessel, taken possession of by a lawful cruiser for the purpose of a legal inquiry, may not be allowed to resort to violence to withdraw themselves out of that possession. I have no hesitation in pronouncing this ship and cargo ⁴ liable to condemnation, on the ground of the parties having declared themselves enemies by this act of hostile opposition to lawful inquiry."⁵

But the master or crew of a neutral vessel captured are not bound to assist in carrying her into port for adjudication. Resistance to the captors, by the master or crew, must be proved

¹ See also 8 T. R. 230 ; 9 East, 283.

² Edw. 207, and see Stewart, 70.

³ 5 Rob. 35.

⁴ And so where the cargo was not the property of the rescuers, 2 Acton, 106. But otherwise where the rescuers were enemies, and the owners of the cargo neutrals, 5 Rob. 232.

⁵ Lord Stowell, 3 Rob. 278, and see 5 Rob. 232.

to have been actually made, in order to subject the vessel to condemnation on this principle of rescue.¹

On this subject, both the great Whig and Tory reviews are agreed.

"The right of search for seamen" (says an able writer in the *Quarterly Review*) "is precisely of the same nature as that of goods contraband of war. Every commander of a ship of war is instructed 'when he meets with any foreign ship or vessel, to send a lieutenant to inquire whether there may be on board of her any seamen who are subjects of his majesty, and if there be, he is to demand them, provided it does not distress the ship: he is to demand their wages up to the day; but he is to do this without detaining the vessel longer than shall be necessary, or offering any violence to, or in any way distressing, the master and crew.' In the present day, merchant-vessels only are intended by this instruction; but in the instructions given by the Earl of Northumberland, lord high admiral, to Sir John Pennington, dated 4th April, 1640, 'men of war' are expressly included; and in 1687 a Dutch man of war, coming into the Downs, was visited by the English guardship, and four Scotchmen and a boy taken out of her. The Dutch ambassador to the Court of London complained of this in a memorial, which he addressed to the Secretary of State. The memorial was referred to Sir Richard Raines, then Judge of the Admiralty Court, who defended the principle, on the natural right which sovereigns have to the services of their subjects, and on the practice which had been followed in all ages. He contended that 'his majesty, having this right, must be allowed to have the liberty of means effectual to this end, which means are to compel his subjects to do their duty; otherwise the right is vain; and so are the means, if they must be used only by words and proclamations.' The complaints of the Dutch of our unfriendly treatment of them, in visiting ships of war in search of English seamen, had indeed induced King Charles II. to bring the matter under serious consideration. In 1677 it was discussed at the Board of Admiralty, at which the king, as was not unusual in those days, presided in person. The standing instructions being read, and the first point regarding the search of foreign ships of war for English subjects, and the demanding and taking them out, being submitted, it was resolved, 'It is our right and to be continued.' It appears, however, from the Pepysian papers, ultimately to have been settled that, although the practice was too ancient (as well as justified by the king's natural rights) to make any variation in the

¹ 1 Acton, 33, and see 2 Acton, 20.

instruction with respect to demanding them from foreigners, yet it was judged advisable to leave out the clause which compels the master to pay them their wages, as being unreasonable on many accounts; and although the article of examining foreigners was to be continued in the public instructions, yet Mr. Pepys was directed to draw out a private article, instructing our commanders to be discreet in the execution of it to foreign merchantmen; and, as to men of war, only to make use of such fair means as they could, without any force, to inform themselves of the number and names of his majesty's subjects on board of them; and, if refused to be delivered up, on a fair demand, to report the matter to the Admiralty, in order that the king may demand them together with satisfaction for their detention.¹ We are not aware that any instructions subsequent to the reign of Charles II. authorized the searching of men of war; nor do we know of a single instance of the kind having occurred since that of 1687, till the late American affair of the Chesapeake, in which the conduct of the British admiral (Berkeley) was wholly disapproved by his government, and he was immediately removed from his command."²

The law of nations as now settled stands thus:

"If the foreign vessel refusing search" (says Lord Brougham in the *Edinburgh Review*) "is a ship of war, such conduct is a direct injury committed by the government of one nation against another, for which she has a right to seek redress by going to war. But if the offending vessel belong not to a foreign government, but to a private trader, the case is different. For no power can be effectually responsible for the conduct of all its subjects on the high seas; and it has been found more convenient to intrust the party injured by such aggressions with the power of checking them. This arrangement seems beneficial to all parties; for it answers the chief end of the law of nations—preventing injustice without the necessity of war. Endless hostilities would result from any other arrangement. If a government were to be made responsible for each act of its subjects, and a negotiation were to ensue every time that a suspected neutral merchantman entered the enemy's port, either there must be a speedy end put to neutrality, or the affairs of the belligerent and neutral must both stand still. If the suspected vessel is a ship of war, no such inconvenience can follow from seeking redress by negotiation merely. A neutral has very few ships of war: if she has many, this is a circumstance of evidence against her, and a good ground of complaint. Not only is this remedy easy and safe to all parties,

¹ Pepys MS. Collection in the Admiralty Records.

² Quart. Rev. vol. vii. pp. 17—21.

but it is the only remedy which is not exceedingly liable to abuse, and full of danger to the public peace of nations. No serious consequences are likely to arise from allowing men of war to search merchant ships, more especially if the right is confined to vessels of the state, and withheld from privateers. Nothing but hostility can result from allowing one ship of war to search another ship of war, because, if a national spirit is anywhere to be found, it is on board of such vessels. Moreover, the injury done to a private trader by searching is insignificant, compared to the benefit secured to both nations by such a practice. But the injury done to a ship of war by searching is both much greater in itself, from the insult to the honour of the crew, and bears a much greater proportion to any good which can be supposed to result from the practice, even on the highest estimate, because there are very few such vessels to search.”¹

The right of visitation and search on the high seas does not exist in time of peace. “It is true,” says Lord Stowell, “that wild claims have been occasionally set up by nations, particularly those of Spain and Portugal, in the East and West Indian seas; but these were claims not of a general right of visitation and search upon the high seas unappropriated, but extravagant claims to the appropriation of particular seas, founded upon some grants of pretended authority, or upon some ancient exclusive usurpation. Upon a principle much more just in itself, and more temperately applied, maritime states have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has, for their common convenience, allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations, more immediately affecting their safety and welfare. Such are our

¹ Edinb. Rev. vol. xi. pp. 9, 10. In the year 1818, a treaty was set on foot between Great Britain and the United States of America for the abolition, as between those nations, of the right of search for each other's subjects. The intended articles recited “the inconveniences which had arisen from the difficulty of discriminating between the subjects and citizens of the two powers respectively;” but the negotiation failed, according to Mr. Rush, one of the American plenipotentiaries, upon two differences of mere detail.—See Rush's *Residence at the Court of London*, chap. xx. There is no treaty with America for the reciprocal search for slaves, and consequently no such right of search. Any detention and search of an American ship must therefore be made at the peril of her not turning out to be a slaver.

hovering laws, which within certain limited distances, more or less moderately assigned, subject foreign vessels to such examination.”¹

The municipal law of Great Britain and Ireland is violated by any persons dealing in slaves, or exporting or importing them, or shipping them for such purposes, or embarking capital in the slave-trade, or guaranteeing slave-adventures, or shipping goods &c. to be so employed, or serving on board of slave-ships, or insuring slave-adventures, or forging instruments relative to the slave-laws. The penalties are, forfeiture of the ship and the owner's goods, and of double the value of the shipments; and the offences are besides, a transportable felony in superior officers and persons, and a misdemeanour in petty officers and seamen serving on board such ships.²

In the construction of the 45th section of this act, which extends to persons seizing and prosecuting under the benefit of the 4 Geo. 3, c. 15, and any other act made for the protection of officers seizing and prosecuting for any offence against the said acts, it has been decided by the Judicial Committee of the Privy Council,³ “that it is not the provisions for their benefit, but for their protection only, that are referred to, such as the exemption from liability to costs and actions for seizures, if the judge should certify that there was reasonable cause for seizure; and that therefore the burthen of proof of the facts necessary to constitute a liability to forfeiture or penalties lies on the prosecutor, as in ordinary cases, and not on the defendant as under those acts, and consequently, that it does not lie on the master to prove that any persons on board of his ship were not slaves, or persons falling within the description of the act, nor to disprove his knowledge of that circumstance, if such knowledge be necessary to constitute the offence.”

¹ 2 Dods. 245, 246.

² 5 Geo. 4, c. 113, ss. 2, 4, 10, 11.

³ Case of the *Winwick*, 3rd July, 1840, not yet reported.

B. F.

ART. IV.—AS TO ENLARGING A BASE FEE AND A *QUASI*
BASE FEE.

WILLIAM BANNER, by his will dated the 25th of September, 1790, devised all his freehold messuages, lands and hereditaments in the county of Durham, unto and to the use of three trustees, their heirs and assigns, upon the trusts thereafter declared concerning the same; and he devised all his messuages, lands and tenements in the same county, held by leases for lives under the Bishop of Durham, unto and to the use of the same trustees, their heirs and assigns, for and during all his estate and interest therein, upon trust to support the contingent trusts and estates thereafter thereof limited, and by the usual ways and means to preserve the same from being defeated or destroyed, and upon the other trusts thereafter declared concerning the same, that is to say, in trust to do every act that might be necessary for obtaining new leases of the same premises from time to time, as often as any of the persons upon whose lives the then present or any future leases thereof respectively might depend should depart this life, or oftener, in case the said trustees, or the survivor of them, his heirs or assigns should think proper, and by and out of the rents and profits of the said leasehold premises thereinbefore devised to pay the respective rents reserved, and to perform the respective covenants contained in the then present and all future leases thereof respectively, and also by and out of the rents and profits, or by mortgage thereof, or of any part thereof, to raise and levy from time to time such sum or sums of money as should be sufficient for the payment of the fines, fees and expenses incident to or attending every such renewal, and to apply the money so to be raised for the answering of those purposes accordingly: **AND** the said testator directed that the said trustees, their heirs or assigns, should stand and be seised of the said freehold and leasehold premises thereinbefore devised, subject to the trusts thereinbefore thereof respectively declared, upon the trusts and to and for the intents and purposes thereafter expressed and declared, i. e. in trust that they the said trustees, their heirs and assigns, should by and out of the rents and annual profits of the said freehold and leasehold premises thereinbefore devised, or any

part thereof, respectively raise and pay to his wife, Margaret Banner, during her life, the yearly sum of 80*l.* in manner therein mentioned, and subject thereto, the said testator directed the said premises should be in trust for the heirs of his body, and in default of such issue, upon further trust that the said trustees, their heirs and assigns, should by and out of the rents and annual profits of the freehold and leasehold premises, raise and pay to his niece, Jane Paul, the yearly sum of 30*l.*, and to his niece, Ann Broty, the like sum of 30*l.* in manner therein mentioned, and subject to the trusts thereinbefore thereof declared, the said testator directed that the said freehold and leasehold premises should be in trust for his said wife during her life, and after her decease upon trust that the said trustees, their heirs and assigns, should by and out of the rents and annual profits of the said freehold and leasehold premises, raise and levy during the life of his nephew, Robert Banner, the yearly sum of 50*l.* in manner therein mentioned, and subject to the trusts thereinbefore thereof declared, the said testator directed the said freehold and leasehold premises should be in trust for his nephew, Coutts Banner, for his life, and after his decease, in trust for the first and every other son of his said nephew, Coutts Banner, severally and successively in tail male, and in default of such issue, in trust for his niece, Margaret Black, for her life, and after her decease, in trust for the first and every other son of the said Margaret Black, severally and successively in tail general, and in default of such issue, in trust for the daughters of the said Margaret Black as tenants in common in tail general, with cross remainders between them in tail, and in default of such issue, in trust for John Roberts and the heirs of his body, and in default of such issue, in trust for his the said testator's own right heirs.

The said testator died in the year 1799 without issue, leaving his wife and the several other devisees named in his will him surviving.

During the life of the testator's widow, that is in 1802, John Roberts, who was entitled to the ultimate remainder in tail, became bankrupt, and the commissioners, by the usual bargain and sale inrolled, conveyed all messuages, lands, tenements and hereditaments, as well freehold as copyhold and customary, whereof or wherein the said John Roberts, then

was anyways seised, possessed of, interested in, or entitled unto any estate of inheritance in fee simple or for life or lives or otherwise, to the assignees, and by lease and release of 11th and 12th March, 1808, the assignees conveyed all the messuages, lands and hereditaments, devised by the said will in trust for the said John Roberts as aforesaid, to William Greenfield, a purchaser.

Couts Banner, the nephew of the testator, died without issue.

After the death of the testator's widow, his niece, Margaret Black, entered into possession of the devised property, and enjoyed the same until her decease in the month of April, 1839, when she died without issue, having survived all the annuitants named in the will.

During the lives of the testator's widow and of his niece, Margaret Black, the leases for lives under which the leaseholds of the testators were held were renewed several times, and the fines paid by the widow and Margaret Black respectively, and the trustees charged the same in their favour on the devised property, and at the death of Margaret Black, the sums so charged amounted to the sum of 1000*l.* and upwards, and the same was claimed as a debt by the personal representatives of the widow and Margaret Black respectively.

John Roberts, the bankrupt, died in the lifetime of Margaret Black.

Previous to the purchase made by Mr. Greenfield, as before mentioned, he took the opinions of Mr. Butler, the late Mr. Shadwell, and Mr. Sanders, upon the effect of a conveyance from the assignees of the bankrupt of the fee simple and leasehold estates devised by the will of William Banner.

Mr. Shadwell's opinion was, that the bargain and sale of the commissioners barred the interest of John Roberts and the issue of his body in the leaseholds for lives, but not the ultimate reversion to the right heirs of the testator, and that the purchaser under a conveyance from the assignees would only acquire in the leaseholds for lives a quasi base fee, and that if the bankrupt should die without issue before his estate tail came into possession, or if the issue should fail after the estate tail came into possession, then that his, the purchaser's, interest would determine, and the right heirs of the testator would become entitled. And he was of opinion that if John Roberts

or any issue of his body should be living at the determination of the particular estates limited antecedent to his estate tail, that neither that circumstance alone, nor that circumstance and any act to be done by the purchaser alone, could defeat the remainder to the testator's right heirs; but he thought that such ultimate remainder might be defeated by the concurrence of the commissioners and John Roberts, or his issue, as the case might happen, in a bargain and sale inrolled to the purchaser, and this both with respect to the estates in fee simple and the leaseholds for lives. This opinion was dated 24th of July, 1807.

Mr. Butler was of opinion that a conveyance from the assignees would give the purchaser an absolute title and estate in the leaseholds for lives on the determination of the estates prior to the estate tail of the bankrupt.

Mr. Sanders' opinion was, that the purchaser would, by a conveyance from the assignees, acquire as to the fee-simple property an estate which would continue so long as John Roberts or any issue of his body should live, and that the same would vest in possession on the determination of the preceding estates. That should John Roberts or any issue of his body be then living, the purchaser might, with the concurrence of John Roberts or his issue, defeat the ultimate reversion to the right heirs of the testator by a common recovery; but he thought it very doubtful whether another bargain and sale at that time from the commissioners would have the effect of barring such ultimate reversion. The inclination of his opinion was that it would not, for he conceived that the commissioners, having by deed indented and inrolled, conveyed all the bankrupt's real estate to the assignees, the power given by the act 21 James I. cap. 19, s. 12, was wholly exhausted, and that they had no other power except that which they derived from the act. With respect to the freehold leases for lives, he conceived that the purchaser would acquire by the conveyance by the assignees such an estate only as would continue during the existence of John Roberts and the heirs of his body, that is to say, that the estate of the purchaser would determine upon the decease and failure of issue of John Roberts. It was true, he observed, that neither a fine nor recovery by tenant in tail of freehold for lives was necessary to bar the quasi entail and

remainders over, any alienation by the tenant in tail having that effect; but he thought that the analogy derived from the case of fee-simple estates must be pursued, and that the concurrence of the preceding tenant for life was necessary to give effect to the conveyance of the quasi tenant in tail in remainder of an estate held *pur autre vie*.

With respect to the fee-simple estates, it is clear that the conveyance by the assignees to William Greenfield gave him merely a base fee in remainder; and it is difficult to conceive, as the law was when the opinions cited above were given, how a new bargain and sale by the commissioners, when the prior estates had determined, could enlarge that base fee into a fee-simple absolute, to the exclusion of the ultimate reversion in fee. However, this was a question on which Mr. Hayea observes,¹ "conveyancers were much divided in opinion." By the statute of James the bargain and sale of the commissioners was good against the bankrupt, his heirs and issue, and all persons whom he himself might bar by fine or otherwise, so that it is apprehended the bargain and sale vested a base fee in the assignees and no more, and the statute seems to afford no ground for saying that any scintilla juris remained in the commissioners after the exercise of their statutory power. There is no doubt that if John Roberts had not become bankrupt, and had by fine conveyed his estate tail in remainder in the fee-simple lands to William Greenfield, he or his issue might, after the determination of the prior estates, have barred the ultimate reversion by being vouched in a recovery, this Mr. Hayea calls² "a bare personal privilege." Now assuming that the commissioners had no claim to this privilege, did the bankruptcy prevent it coming to John Roberts or his issue? Might it not be fairly deemed as a new right unaffected by the previous bankruptcy, and that John Roberts, having obtained his certificate, or his issue, in case of his death, would take it as beneficially as if no bankruptcy had occurred? If it were held that after bankruptcy this personal privilege could not come to John Roberts, would it not follow that it vested in his assignees under the bargain and sale of the commissioners, and that it passed to the purchaser as an incident to the estate?

¹ Introduction to Conveyancing, vol. i. p. 200.

² Ibid. p. 186.

This question, however, seems now set at rest by the Fines and Recovery Act, which enacts, sect. 19, "That after 1st December, 1833, in every case in which an estate tail in any lands shall have been barred or converted into a base fee either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons whose estates are to take effect after the determination or in defeazance of the base-fee, into which the estate tail shall have been converted, so as to enlarge the base-fee into a fee-simple absolute, saving always the rights of all persons in respect of estates prior to the estate tail, which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made."

Under this section it is apprehended to be clear that the coheirs of John Roberts may now enlarge the base fee vested in William Greenfield into a fee-simple absolute, neither the commissioners nor the assignees under the bankruptcy having any rights remaining in them which are saved by the act.

Mr. Hayes observes,¹ "under the old system it often happened that a tenant in tail aliened without effectually barring the entail and remainders, and that he or the issue in tail afterwards consented to perfect the title by a recovery. In these cases it was generally necessary that the alienee, as having the legal freehold, should join in making the tenant." And Mr. Hayes concludes that sect. 29 of Fines and Recoveries Act constitutes such an alienee, if the alienation were before 1st January, 1834, the protector, and that consequently his consent is requisite. It appears that there is much difference of opinion among conveyancers on the point whether such an alienee is a protector or not; but we confess upon a careful examination of the act we are clearly of opinion that he is not. We admit that if sect. 29 stood alone, that if it were an independent enactment, Mr. Hayes' conclusion would be right; but we observe that it is prefaced by "provided always," which shows that it is only a qualification or an explanation of some preceding clause, and that clause is certainly

¹ Introduction to Conveyancing, vol. i. p. 177.

sect. 22. Now sect. 22 is in substance as follows: That if at the time when there shall be a tenant in tail [*i. e.* a person either actual tenant in tail, or a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail, if the same had not been barred] of lands under a settlement, there shall be subsisting in the same lands under the same settlement an estate for life or greater estate *prior to the estate tail*, then the person who shall be owner of such prior estate, or would have been owner had he not disposed of it, shall be the protector. The object of sect. 29 is clearly only to qualify and limit the operation of sect. 22, and the "estate under a settlement," of which sect. 29 speaks, must be understood as referring to an estate *prior to the estate tail* in question, and not to an estate derived out of the estate tail.

Next as to the bankrupt's interest in the freehold for lives. It seems to be now decided, in conformity with the opinions of Mr. Shadwell and Mr. Sanders, that a conveyance by a tenant in tail in remainder in such property does not bar the remainder over.¹ The question then arises how Mr. Greenfield's estate in the leasehold for lives can now be rendered absolute. It is clear that the Fines and Recovery Act does not extend to such property; and we think John Roberts, having died during the existence of the prior estates, the privilege of barring the ultimate reversion cannot be held to be vested in the commissioners or assignees under his bankruptcy. In analogy then to the case of fee-simple estates, we think a conveyance from the heirs of John Roberts would defeat the ultimate reversion in fee.

¹ Introduction to Conveyancing, vol. i. p. 198.

**ART. V.—AS TO CONTRIBUTION BY A REMAINDER-MAN
TOWARDS THE FINES AND EXPENSES ON RENEWING
LEASEHOLDS FOR LIVES IN SETTLEMENT.**

IF renewable leaseholds for lives be devised to one for life, with remainders over, and there is no direction in the will as to the renewing of the lease, it is clear that the tenant for life cannot be compelled to renew, and is under no obligation to renew. He cannot be compelled to supply new candles.¹

But if such a tenant for life does renew without any communication with the remainder-men, as those in remainder cannot have the benefit of the new lease at all without the aid of Chancery, that Court will compel them to pay in proportion to the benefit they derive from the new lease.² If the tenant for life is, at the time of the testator's death, one of the cestui que vie, and renews the lease, and the remainder-man does not repudiate the new lease, he, the remainder-man, must pay the whole charge, that is, the sum paid by the tenant for life, with interest from the time of the advance.³ But if the tenant for life is not one of the cestui que vie, and provides a new candle, whether his own life or the life of any other person is immaterial,⁴ the remainder-man only pays in proportion to the benefit he may derive from such new life. Suppose T. be tenant for life, and A., B. and C. three lives, at the death of testator, and then A. dies, and T. supplies a new life, D. and B., C., and D. survive T., the remainder-man must pay the increased value of the estate at the death of T., arising from the insertion of life D. Of course, if in such a case T. inserts his own life, or sets up a candle which is wholly consumed during his, T.'s, own life, the remainder-man cannot be called upon to pay anything.

If in the case supposed, the tenant for life refuses to renew, the remainder-man may apply to the Court of Chancery, and may compel a renewal, but of course at his own charge.

Again, if renewable leaseholds for lives be devised to trus-

¹ See dicta by Lord Thurlow in *Stone v. Theed*, 2 Bro. C. C. 242; and by Lord Eldon in *White v. White*, 9 Ves. 561.

² Per Lord Thurlow in *Stone v. Theed*, 2 Bro. C. C. 242.

³ *Adderley v. Clavering*, 2 Cox, 192; and see 9 Ves. 562.

⁴ 9 Ves. 561.

tees in trust for T. for life, with remainder over, and there is no fund provided for renewal, and no direction at all as to renewal, the first question is, Is it the duty of the trustees to renew? and we incline to think it is. If in such a case T. be one of the lives, it seems that no part of the expense can be charged against him.¹ This, however, we think, may be doubted; for the trustees hold the property not merely for the benefit of T. during his life, but that the same may be continued for the remainder-men; and if it be their duty to renew, that duty is the first charge on the property: and though T. be one of the lives in the lease, the renewal of it cannot be deferred during his life without greatly increasing the fine, and in many cases endangering the property. But if T. is not one of the lives, then he must contribute a due proportion; and perhaps the decree of Mr. Baron Alderson, in *Reeves v. Creswick*,² fixes the proportion to be contributed by the respective parties as conveniently and equitably as may be. In that case the value of T.'s interest in the lease before the new life was supplied was calculated, and then the value after the life was added, and the difference was the amount to be paid by T., and the remainder of the cost of renewal was charged against the remainder-man. The whole cost of the renewal was raised by mortgage, and to secure the payment by T. of his proportion, his life was insured for the amount, and the trustees were ordered to pay the premiums of the insurance and the whole of the interest out of the annual profits. We are not aware that this mode of calculation was ever adopted before; and it should be observed that the decree is merely a modification of the rule exploded by Lord Thurlow.³ It is a calculation founded upon the probable, instead of the actual, benefit received by the respective parties. It was making the remainder-man, and an infant too, pay part of the cost of a life from which he might derive no benefit whatever. Lord Eldon seems originally to have approved of Lord Thurlow's reasoning and decision, and argues the question with his usual foresight and acumen. In the case before Lord Thurlow, the

¹ Per Lord Hardwicke, 1 Ves. sen. 429, in *Verney v. Verney*; and see *White v. White*, 9 Ves. 554.

² 3 You. & Coll. 715.

³ See 2 Myl. & K. 118, 119, 121.

tenant for life paid the whole of the fine and expenses, and a contribution was sought from the successor, and Lord Eldon observed,¹ "It could not have escaped Lord Thurlow that the case might have been just the converse of that; that the tenant for life might not have had the means for renewing; and might have been obliged to borrow the money of the remainder-man of such renewable term. Then the question would be, how the remainder-man was to have it determined, what part of that sum he would be entitled to demand against the tenant for life; and upon the same principle as in the former case, Lord Thurlow must have said, *he could not determine till the death of the tenant for life, whether the remainder-man ought to pay anything.* At the death of the tenant for life he could determine, upon the same principle as in the other case, what the tenant for life ought to advance to the remainder-man. It affords that difficulty, and is exposed to risk, with reference to assets, I admit. But the authority is very high; has stood twenty years; and does not involve nearly so much difficulty as belongs to the other supposed rule. I admit the tenant for life may not be able to pay that sum. But that perhaps from the nature of the thing cannot be helped; and the utmost extent you can go is, to make the tenant for life give security for the sum that eventually may be due. But that does not afford a stronger objection than that of the Court laying its hands upon the funds of an infant remainder-man; [this was what the Court did in *Reeves v. Creswick*;] and paying for his benefit, when he may have no benefit."

Where a testator indicates an intention that fines on the renewal of leases should from time to time be paid, in order to maintain a permanent interest in the property for the benefit of those to whom he has successively limited his estates, and has not described the fund out of which such payment should be made, the general principles of equity require, and the course of authority has settled, that the tenant for life and those in remainder shall bear the burthen of those payments in the proportion of the benefits which they *actually* derive from such renewals. Where a testator, having the same purpose, expressly provides a fund for such payments, the question no longer depends upon general principles of equity, but, as

¹ 9 Ves. 558.

to the manner of raising the fines and the contribution of the tenant for life, is to be determined by the intention of the testator in both respects, as it is to be collected from the whole will.¹ Such was the language in which Sir John Leach in a very late case expressed the rule of law we are now considering; and it is only doubtful, as we shall soon see, whether he was correct in making the *actual* benefit to be received by the respective parties the measure of contribution.

We come then now to cases of much greater difficulty than those referred to above, cases in which the testator did give some direction as to the renewing of the lease, and these of course must depend upon their own particular circumstances. The first case to which we refer is *Stone v. Theed*,² before Lord Thurlow, a very high authority on such a question, for the subject was often before him, and was "anxiously, frequently and gravely" considered by his lordship.³ In that case, testator devised freeholds and leaseholds for lives and personal estate to trustees in trust to pay an annuity, and subject thereto to E. W. for life, and after her decease to maintain children during their minorities, and then for them, and in default of children to S. T. absolutely. He directed the trustees to renew the leases from time to time, and empowered them to place out and invest the *overplus* of the rents on securities. Two renewals were made by the trustees, and the question was out of what fund the expense should be paid. The judgment of the Lord Chancellor is extremely valuable. He observed, the question turns upon the words, "I direct my trustees to renew the lease and to add new lives, if they can obtain such lease. A beneficial enjoyment of the lease was intended to the several lives in succession. The first question is, whether this provision is for the purpose of the original trust or for any other, and, if so, to what degree and in what proportion; and there is nothing in the will to diminish the unlimited trust. I must consider the thing bequeathed to be the subsisting lease, subject to renewal. Suppose this were the case of an estate, to which an embankment was necessary in order to protect the estate: there could be no doubt that it was a clear indication that the first trust was to keep the

¹ Per Sir John Leach, M. R., in *Playters v. Abbott*, 2 Myl. & K. 108.

² 2 Bro. C. C. 242.

³ Per Lord Eldon, 9 Ves. 560.

estate productive by embankments or other building; or in the present case, by a strict analogy, by keeping the leases renewed. I think the terms of the will bind the trustees to apply the funds of the estate for that purpose. Secondly, the next question is, whether the testator can be understood to have made a provision which might exhaust the estate of the first taker. The argument upon this part of the case is a fair argument, as to the construction of the will. The testator's expressions are as strong as if he had said expressly, he meant the lease to be kept up; he must be understood to sacrifice the intent of a provision for the first taker to the original intent of keeping up the estate. Where an estate of limited duration is given to one for life, the intent is, to give him whatever it shall produce during his life; and, in that case, unless there are strong expressions to show an intention, the court cannot compel him to renew. But, where such a tenant has renewed, there the court has said, that the estate given him being, from its nature, capable of renewal, the tenant for life, in renewing for his own use, would be making an unconscientious benefit of the estate. The case of *Rumford Market* is the first and most notorious case on this subject. The court therefore thought of an apportionment, and that so much as the tenant for life took for himself he should pay for; so much as he took for the benefit of another, he should be paid for by that other. The division which the court originally made of the burthen was found to be arithmetically wrong, though the principle that it should be borne in proportions was right. Therefore, I thought it necessary in the case before me, that the proportion should follow the benefit; but that all turns upon the tenant for life not being suffered to take an advantage. In the present case, no advantage could be taken. The question then is, out of what fund it is to be paid. The whole is made a general fund. The whole is one trust, and the trustees are to use the whole estate according to the will. The whole fund (the rents and profits, the personal estate not being productive), must pay the expenses of the trust. The produce of the whole must be first paid to the purpose of the renewals."

In the case just cited, the Lord Chancellor held that the thing bequeathed was the subsisting lease subject to renewal, that is, subject to the cost of renewal; and consequently that

the renewal was to be made, though the interest of the tenant for life might be thereby sacrificed. *The produce of the whole must be first paid to the purpose of the renewals.*

The next case to which we refer is *White v. White*:¹ there the testator devised leaseholds for lives to several persons for life in succession, then to Charles White and his heirs male, with remainder to his the testator's right heirs for ever, and he empowered the respective tenants for life as occasion should require, to renew the lease and to mortgage the same for such purpose on every renewal to the extent of 500*l.* One of the tenants for life did renew, and took a new lease for the lives of himself and two other persons, and charged the premises with 500*l.* One of the lives having dropped, Charles White, the remainder-man in tail, filed a bill, praying that the tenant for life might be decreed to procure a new lease; and the decision of Lord Alvanley, Master of the Rolls, was that a new lease should be obtained, and that the estate should be charged with the further sum of 500*l.*, and that the excess of expense should be defrayed by the remainder-man, the tenant for life keeping down the interest of the two sums of 500*l.* This decree was affirmed by Lord Eldon,² who thought that according to the true construction of the will, the tenant for life, on renewing the lease, was authorized to insert his own name as one of the cestuis qui vie, and that the testator did not mean to impose upon the tenants for life the obligation to renew, if raising the 500*l.* would not enable them, but that the will did give the remainder-man a right to call upon the tenant for life to permit the estate to be mortgaged to the extent of 500*l.*, if the remainder-man thought proper to take the rest upon himself.

In *White v. White* we certainly find nothing contrary to *Stone v. Theed* and the prior cases; in fact, after allowing the special direction of the testator full effect, the decree was in exact accordance with the cases in which there was no particular direction in the will. We now come to the case of *Allan v. Backhouse*; ³ there the testatrix devised leaseholds for lives, after certain life estates, to trustees, their heirs and assigns, in trust for George Allan for life, with remainder to his first

¹ 4 Ves. 24.² 9 Ves. 554.³ 2 Ves. & B. 65.

and other sons in tail male, with remainders over. The will then directed that the leases as occasion should require should be renewed and filled up, and that the fines and expenses attending every such renewal should be raised out of the rents and profits of the respective leasehold premises, or out of the rents and profits of the freehold messuages devised by the will. George Allan, the tenant for life, when in possession, applied to the trustees to renew one of the leases in which two lives had dropped, but they refused to do so, insisting that by the terms of the will the tenant for life was bound to renew at his own expense. Sir T. Plumer, Master of the Rolls, however thought that the case was within the ordinary rule, and directed an inquiry what proportion of the capital as well as the interest, with reference to the benefit derived by the tenant for life, was to be paid by him.

The decree made by Sir Thomas Plumer directed that the expenses of the renewal should be raised by sale or mortgage of the whole devised property; and he referred it to the master to inquire what proportion of the mortgage, as well as the interest, with reference to the benefit derived by the tenant for life, should be borne by him. This decree appears to have been confirmed by Lord Eldon, but there is no report of the arguments which were used on the appeal, nor of the reason upon which the affirmance of Sir Thomas Plumer's judgment proceeded. It must be observed that this decision is not strictly in unison with Lord Thurlow's judgment in *Stone v. Theed*; and it is not easy to understand how it was possible for the master to state the proportion of the expenses of renewal to be borne by the tenant for life, since, according to settled principle, and the language of the decree, it was to depend upon the actual benefit which he should derive from the renewal, and which could not be ascertained until his enjoyment determined by his death. It does appear, however, by the Registrar's Book, that the master did, during the life of the tenant for life, report that a certain sum ought to be paid by him, and such report was submitted to without question. Such is the reference made by Sir John Leach, M. R., to the case of *Allan v. Backhouse*;¹ and from this we see how important it is that we should know upon what ground

¹ See 2 Myl. & K. 120.

Lord Eldon affirmed the decree; and we are happy to say, that though there is not any report in print,¹ we have been obligingly furnished by one of the parties interested in the suit with a copy of the judgment of Lord Eldon, which we are sure will be received by the profession as a most valuable present.

ALLAN against BACKHOUSE, Court of Chancery, August 7th, 1821. Judgment of the Court in this case, as pronounced by the Lord Chancellor at the conclusion of the argument.

“ In this case the testatrix, Ann Allan, seems to have been possessed of very considerable freehold, copyhold, and leasehold estates renewable, and makes her will, and by that will devises all her freehold, copyhold, and leasehold estates to James Allan for life; she devised her legal estates to him; and he takes a legal interest in those estates. And after his death she devises all her freehold, copyhold, and leasehold estates to George Allan the elder for his life, and after the decease of George Allan the elder, she devises the estates to James Allan the younger. I think there are three tenants for life, or are there only two? It comes exactly to the same thing.” Mr. Roupell.—“ My lord, there were two tenants for life.” Lord Chancellor.—“ I correct myself and say, that after having devised her estates successively to James Allan and to George Allan the elder, she then devised all her freehold, copyhold, and leasehold estates to two gentlemen of the names of Leonard Robinson and James Backhouse as trustees, in trust, first for George Allan the younger, and then in trust for his sons in tail male, with a great number of limitations over: and the question here is, how the testatrix meant that upon the falling in of lives, by which the leasehold estates were held, these leasehold estates should be renewed, and what Mr. Wray states is accurate, the Court must act on what it considers to be the intention of the testatrix, and must endeavour to collect rightly what was the true intention of the testatrix: and in this case one may lay aside all the cases of a certain class that have been referred to. If a life estate is devised to A. B. for life, with remainder to B. C. to take it absolutely; if there is no necessity in A. B. to re-

¹ See Jacob, 631.

new, if he is not bound to renew, he need not renew. But if he does renew, he is supposed to take what is considered to be fair and just, he takes it for the benefit of all who would have taken the benefit of the original lease, making an equitable compensation according to their respective interests.

“Now in these cases of renewals of lives, the old rule in this Court was, that the tenant for life should pay one-third, and the person who took the inheritance should pay the other two-thirds; and probably this Court was driven to adopt the rule from the difficulty of applying a just rule in most cases that came for decision before the Court. It is quite obvious before Lord Thurlow’s time, that might be a most improper mode of charging. Suppose a man is a tenant for life of a leasehold estate, and he thought proper to renew for ninety-nine years, and suppose the property is purchased for 3000*l.*, the tenant for life was to pay 1000*l.*, and the persons who took the inheritance the other 2000*l.*; we have now got a rule which may be considered as an improvement, or if not an improvement it is at least a precedent, we have at last got to this easy rule, but it is not so easy to apply it in particular cases. *The rule is to charge the tenants for life and the persons in remainder in proportion to the benefit and interest which each of them is supposed to have in the lease that is renewed.* And there are decisions upon that principle. And you must calculate the different interests on that as well as you can; but that is not the sort of case we have here, except in some respects which I shall take the liberty to mention by and by. Here, the question is, out of what fund the testator meant these renewals should be paid. Whether she meant these renewals should be paid out of the annual rents and profits. There is a great difference between rents and profits and annual rents and profits. If she meant they should be paid out of the annual rents and profits, it does not signify how hard it should happen to be, he who takes under her will must take according to her will, and he must submit to the conditions she has thought proper to impose upon him. I do not think it will be possible to reconcile these propositions, because the testatrix in one or two parts of her will means by rents and profits annual rents and profits, and therefore with reference to such a question as this,

we are to construe these words in the same sense in which they occur in other parts of that instrument. In all cases to which I am alluding, I have not the least doubt that rents and profits do not mean annual rents and profits in the settlements. In this case, as in all other cases, the trustees were to preserve the contingent uses and the estates that were limited by the testatrix from being defeated and destroyed, and to preserve contingent remainders, but yet to permit the tenant in possession to receive the rents and profits; and so, with respect to the power of jointturing and power of leasing, she has given the person in possession what is necessary for the exercise of these powers.

“ Now then we have got this length, this is the case of two estates for life. Then the estates are given to the two trustees as I have already stated. James Allan and George Allan the elder were both of them tenants for life of the legal estates. And although it did happen between the death of the testatrix and the death of the survivor James Allan, none of the lives did drop, none of the three persons did die, yet it is impossible not to see on the slightest consideration that some or all of them might have died; and therefore it is fair, when you are endeavouring to look at the true construction of these words ‘rents and profits,’ when you are considering how they are to be construed in this will, it is fair to observe that, after the death of George Allan the elder, the trust estate is vested in two trustees, and these trustees are directed in these terms to deal with the leasehold estate, (the words seem to be large enough to apply not only to the falling in of lives after the trust estate commenced, but previous to the trust estate commencing,) she says, ‘And my will is, and I do hereby desire, direct, and appoint that the respective leases from and under the Dean and Chapter of York and the Lord Bishop of Durham, which I now have or are in trust for me, my heirs and assigns, at the time of my decease, of and in the said leasehold premises at Dalton-upon-Tees and Darlington respectively, shall and may from time to time, when and so often as occasion shall require, be renewed and filled up when the persons on whose lives the present or any future lease or leases thereof may be held do or may depart this life, and the several and respective fines, fees, and expenses incident to or attending

every such renewal shall be raised and paid out of the rents and profits of the same respective leasehold premises, or by and out of the rents and profits of any other part of my said freehold messuages, lands, or tenements in the name or names of my said trustees Leonard Robinson and James Backhouse, or the survivor of them, or his legal representative.' So that the testatrix supposed that between the time of making her will and her decease, some of the lives might have dropped (as certainly they might), and that a renewal might have been necessary, and therefore she could not but be apprehensive that a renewal might be necessary in the lifetime of one or of both the tenants for life. She then declares that all new and other leases at any time thereafter to be had and obtained of the same leasehold premises respectively should at all times during the continuance thereof respectively remain and be upon the same and the like trusts, &c.

" And the question then comes how these words 'rents and profits' are to be understood and construed, recollecting they do carry a meaning in other parts of this will in the sense of annual rents and profits. Do they or do they not mean annual rents and profits? Or do they mean rents and profits in a sense in which they may be understood where the testatrix has not introduced or prefaced them by the word 'annual.' In some of the cases that have been referred to at the bar, it has been shown there was a fund for raising a particular sum for defraying the expenses of the renewals. Having directed trustees to renew the leases and to place out at interest the surplus of the rents of his real and leasehold estates, the testatrix in such a case meant that the fines upon such renewals should be a charge upon that accumulated fund.

" As to the argument on the other side, the strongest way in which it can be put is, that these estates, taking them altogether as comprised of freehold, copyhold, and leasehold estates, were nearly of the value of 6000*l.* a year, and that the fine that was paid on the renewal of the lease amounted to 6650*l.*, and the fees and expenses to 50*l.* more, making in the whole 6700*l.* The question is, whether although in a case where the language is doubtful, and where *primâ facie* the language may not only be said to be doubtful, but we have a *primâ facie* case established here that rents and profits mean

yearly rents and profits, the question is whether the avowed and declared purpose does not show the testatrix did not mean yearly rents and profits when you come to grapple with all the difficulties that occur by putting that sense on rents and profits as meaning yearly rents and profits. Did the testatrix mean yearly rents and profits? Did she mean something immediately after her decease? Had she it in her contemplation that to-morrow one life might fall in, and that in a month hence another life might drop, that during the lives of the two Allans, the two tenants for life, half a dozen lives might fall in, and that they might have occasion to renew? Did she mean that James Allan was to make a provision by his will for accumulating a sum of money to be a fund which was to meet the renewals? Or was he to lay by the rents and profits for that purpose? Or was this to devolve upon the person who took the absolute inheritance? If you say she did not mean that, what did she mean? She must have meant something. If James Allan was not to lay up the rents and profits, you must then conclude that James Allan was to make no provision whatever. Or if he was to make some provision for some renewal, how was he to do this? And let it be recollected in this case you must look to see how this has been demanded, and how it has been paid. The Dean and Chapter of York and the Bishop of Durham say, give us 6700*l.*; you must find us that sum, and you may get it out of rents and profits as you can. It is of necessity that either the tenant for life should lay by a sum to answer the renewal, if you put that construction on the words, or on the other hand you must put him in circumstances to make it possible to pay what may be just. If he is not *ab ante* to accumulate, and you are to trust to future rents and profits first of all, he may be unable to advance it personally; and if he be unfortunately in that situation, he must borrow it. And in any way of putting it, if he happens not to live long enough till the rents and profits are sufficient to pay this 6700*l.*, if there is not any obligation to lay up *ab ante*, then this sum which is charged for the renewal may spread itself out to the next successor to the estates, and from him to the next, and so on until it comes to him who takes the whole inheritance; and therefore you are bound to say, if you mean yearly rents and

profits, you must conceive the testatrix to have meant an application of rents and profits to be accumulated by prudence and discretion to meet the renewals. On the other hand, if you should say why should the tenant for life be called upon to make an accumulation for a renewal which is to be for the benefit of all who are to take under the declaration of trust, why then is he to make that provision?

“Now it does not seem to me in this case that rents and profits are so confined by the language of the instrument, the will or the deed, as to have left the Court no choice. It does appear in this case that the same principle will fairly apply that was laid down in that case that I argued in 1783, where a large sum of money was provided for to be paid out of the rents and profits, and there was nothing to show that that sum was to be paid by a given time. In all such cases you cannot tell what to do with antecedent rents and profits; and inasmuch as you know all the inconveniences of paying, there is a possibility of paying, but nine times out of ten there is not. And the Court has said they will understand rents and profits to mean rents and profits in that large sense which amounts to a devise of land,—of the land itself.

“It is said, and I have agreed to it, that the present Master of the Rolls has held, if sums of money are to be raised, not at a given time, but at a time which is to be fixed by accident, and when it will happen nobody now living can say, that in such a case the money may be raised by sale of part of the property, or by a mortgage. A line is to be drawn between that and a case where it is to be raised by a given time. In the case where no time is fixed, when it is to be raised cannot be ascertained, and therefore you cannot give directions either with regard to rents and profits past or future. I cannot help coming to the conclusion, that the words ‘rents and profits’ have been rightly construed in that respect. There is another circumstance which I think cannot have much effect, and that is, as to the dropping of the first life; and it is said the renewal of the lease ought then to have been made, as it could have been done at a smaller sum; and that it was to be imputed to negligence that the lease was not renewed till after the falling in of the second life. The renewal, however, must be considered as for the benefit of all who were to take under the

trust. Mr. Wray says, and not without great justice, that this is not like a fine to be divided between the person who renews and the person who comes in afterwards. It is merely in proportion to the benefit which each of the persons who are to take the estate actually receives. It is not at all like as if annual rents and profits were to be made a fund to pay the expenses of a renewal ; but the question is, whether the same principle of justice will not apply where the trustees are at the expense of a fund belonging to the estate, if where the money is to be paid for the benefit of all, whether the same principle that has been applied to the proportions of each is to be applied where there is a voluntary renewal for the benefit of all, and where the trustees have renewed. The person who renewed became a trustee for the benefit of himself and of those who came after him. And what difference does it make but a contribution in the one case, when he becomes a trustee for the benefit of all, not in consequence of any directions or compulsion that he should purchase, and the case of this transaction, in consequence of the direction that he should renew ? Different judges, I admit, make a different application of the same words ; and, as it seems to me, the great bulk of the cases go to establish, that where money is to be raised out of the rents and profits, and as in this case no other modes are pointed out, that then, unless there is in the will something that shows that these rents and profits, or the surplus of rents and profits, unless from some words used in the will it is clear that rents and profits are to be understood as meaning annual rents and profits, the general term 'rents and profits' are large enough to authorize this Court to make a charge on this property in the nature of a mortgage. I say, in the nature of a mortgage, because if it were an estate in fee it would be a mortgage. Because when you consider this, it is in some sense an estate of inheritance, though not in perpetuity as between mortgagee and mortgagor. You must proportion this as such among the persons taking the different interests, having regard to the nature, quality, and duration of the estate, as contradistinguished from a fee simple estate.

"It is on these grounds I think the decree that was pronounced by Sir Thomas Plumer is right."

It cannot be denied that this case established a new rule ;

at least we must understand the actual benefit spoken of in the former cases in rather a different sense to that in which it has been usually understood, and was understood by Lord Ellenborough in *White v. White*. Instead of *actual*, we must now say *estimated* benefit. In *Allan v. Backhouse* the master did calculate or estimate, upon what principle we cannot say, the sum which ought to be paid by the tenant for life and remainder-men respectively; and we have been informed that the proportion of the tenant for life was paid by him out of his own pocket, and that the remainder was raised by a sale of part of the estate.

In *Playter v. Abbott*,¹ the testator devised freehold and copyhold hereditaments to trustees in fee, upon the trusts following, that is to say, upon trust that they should by and out of the rents and profits, or by mortgage, sale, or other disposition of the said premises, or any part thereof, raise such sums of money as might be necessary for paying the fines and fees for the admittance of the trustees to the copyhold premises, and also the expense of keeping the messuages and buildings in repair, and also the land tax, quit rents, and other outgoings payable in respect of the premises, and also the costs and charges of performing the trusts of the will, and subject thereto, upon trust that the trustees should by and out of the rents and profits of the premises pay to his wife during her life an annuity of 250*l.* in lieu and bar of dower, and subject thereto, upon trust that the trustees should pay the *clear* rents and profits of the premises to his daughter Elizabeth for her sole and separate use, with ulterior trusts in favour of the children of his daughter. The rental of the testator's estate amounted to about 800*l.* per annum, and the fines to be paid immediately on his decease, on the admission of the trustees to the copyhold estates, amounted to 1400*l.*, besides the expenses, and the question before the Court was, how this latter sum should be raised, and by whom the burthen should be borne. Sir John Leach, M. R., considered it simply as a question of intention, to be solved by reference to the limitations in the will. He argued that the direction to pay an annuity to the widow in lieu of dower, and that the daughter should have the *clear* rents, and further that the power to sell any part, without any

¹ 2 Myl. & K. 97.

direction that the trustees should retain from the tenant for life future annual rents in order to repurchase property equivalent to that sold, proved that it was not the intention of the testator that the trustees should have the power of paying the fines for the admission to the copyholds out of the annual rents and profits; and he decided that the fines and fees should be raised by sale or mortgage, and that the daughter should bear no other burthen in respect thereof than the interest of the mortgage; considering, in fact, that the testator's true meaning was, that the trustees should use the power of sale or mortgage where the purpose could not be answered by annual rents and profits, and should out of annual rents and profits discharge annual payments.

We have cited this case because the principle of it is clearly applicable to the subject we are now discussing. We consider the decision to be right, though perhaps some of the reasoning in the judgment is not very satisfactory. The inference derived from the bequest of the annuity to the widow, and of the *clear* rents to the daughter, is certainly not very convincing; for they were to take subject to the preceding trust, and the nature of their interest could not properly determine the extent of the preceding trust. If that trust required the whole of the annual rents for one or more years, then according to Lord Thurlow's judgment in *Stone v. Theed*, the subsequent trusts must have been sacrificed *pro tanto*.

The strong ground for the judgment was, we think, the power for the trustees to sell; for clearly, if they had sold a part, the tenant for life would have lost only a part of the annual income, and the whole charge would have come out of the corpus of the estate. The giving, therefore, of the power was very strong, to show that it was the intention of the testator, that the charge should be borne by the corpus, and not by a proportionable contribution from the respective *cestuis que trust*.

In the *Earl of Shaftesbury v. The Duke of Marlborough*,¹ the testator devised freehold and copyhold estates to trustees in fee, in trust for his son for life, with divers remainders over. And he limited a term of years in these estates in aid of his personal estate, for payment of all his debts and legacies. He

¹ 2 Myln. & K. 111.

then gave leaseholds for lives and for years to the same trustees, in trust from time to time to renew and keep on foot the leases, and out of the rents, issues and profits of the same premises to pay the fines, fees and other expenses attending such renewals : and he declared that his trustees should stand possessed of the leasehold premises, subject to the trust therein before declared thereof, upon such trusts as would best and nearest correspond with the trust of the freehold and copyhold hereditaments. Upon the death of the testator, a large sum was required for the renewal of leases, and the question was, out of what fund such sum ought to be paid, and when any and what apportionment should be made between the tenant for life and the person entitled in remainder? Sir J. Leach, Master of the Rolls, thought that the provision of the will, which provided for the expense of the renewal in the lease was ambiguous; but he held that the trust for renewal being the first, and all the others expressly made subject to it, that the same did over-ride all beneficial interest in the leases; and that such interest could not take effect until this trust were performed; and that though the trustees should raise renewal fines by way of mortgage, they would be entitled to retain from the tenant for life the perception of the annual rents until the mortgage was satisfied.

This decision was made before the ground of the judgment of Lord Eldon in *Allan v. Backhouse* was known, and it must certainly be considered as of doubtful authority. Sir J. Leach, indeed, seems to have thought that his decree would be in some degree inconsistent with *Allan v. Backhouse*.

We have stated before that the sum of 1000*l.* and upwards was expended by the tenants for life under the will of William Banner, for the renewal of leases, and upon the decease of the survivor of them, the question arose whether they were entitled to be reimbursed the whole or any part of this sum, and the opinions of three of the most eminent counsel of the present day were taken.

The first thought that the sum claimed by the executors of the tenants for life was not in equity a valid and subsisting debt as against the remainder-men; and that the fines for renewal should have been provided for out of the rents and profits, by making a reserved fund, or by an insurance of the lives.

Another opinion was that the executors of the tenants for life had a valid claim upon the leasehold estates for the debt secured, so far as it was contracted by renewals for the benefit of parties entitled in remainder, provided that the testator had not expressed an intention that the costs of renewals should be paid out of the annual rents as between the tenant for life and the parties entitled in remainder. That such an intention was not necessarily expressed by the direction to the trustees, "by and out of the rents and profits, or by mortgage to raise money to renew," since that direction was ambiguous, and might mean no more than that the trustees were authorized so to raise money as against the party in possession, leaving open the question of ultimate contribution between the parties beneficially interested. And that if the present case was to be decided upon an actual intention expressed by the will, it was thought that the executors had a valid claim, and that since one of the lives for which the estate was held at the testator's death survived all the tenants for life, so that they derived no actual advantage from the renewal of the leases for lives, the claim would extend to all the advances for renewals of those leases. It is difficult to apply the cases which have been decided upon this subject. According to *Allan v. Backhouse*, 2 Vesey & Beames, 65, affirmed *Jacob's Reports*, 681, and see *Reeves v. Creswick*, 3 Younge & Collyer, 715, the parties entitled in remainder must bear all the costs of the renewals of the leases for lives, because in the result all the renewals have been for their benefit, and according to *Playter v. Abbott*, 2 Mylne & Keen, 97, to which the present case has some resemblance, the same parties must bear these costs, because the tenants for life were chargeable only with the payment of interest upon the advances. With regard to *Lord Milsington v. Earl Portmore*, 5 Maddock, 471, that case arose not upon a will, but upon a settlement, and was consequently a case of contract; and *The Earl of Shaftesbury v. The Duke of Marlborough*, 2 Mylne & Keen, 111, was decided expressly upon the particular language of the will in that case (Ib. 122.)

We pause here just to notice the opinion of counsel, that because one of the original lives survived all the tenants for life, that therefore they should not contribute towards the

expense of any of the renewals. Surely this is a mistake, and it is certainly contrary to *Allan v. Backhouse* and *Reeves v. Creswick*. The tenants for life took subject to the trust for renewal in the will, and assuming that that trust did not impose upon them the whole burden of renewal, they clearly were not exonerated from bearing a part of the burden arising from the first and principal object of the testator,—the maintenance of his estate and property. Suppose, as was indeed the fact, that lives put in during the estates for life determined before them, and consequently were of no actual benefit either to the tenants for life or the remainder-men, who, according to the opinion last given, should pay the cost of such lives? This not improbable case seems to show the propriety of the new rule established by *Allan v. Backhouse*, and acted upon in *Reeves v. Creswick*:

Another opinion was: "The question in the present case is whether the express provision for renewal varies the equitable rule as to contribution. Sir John Leach, in *Lord Shaftesbury v. Duke of Marlborough*, 2 My. & K. 122, said, that where a fund was provided by an expression that might be considered to be ambiguous, the true intention of the testator with respect to that fund is to be collected from the whole will." Assuming that the will in the present case does not contain anything material in the consideration of the questions submitted to me by the case, which is not set out in the case, it seems to me that there is not any intention to be collected from the will how the fines are to be borne by or apportioned between the tenant for life and remainder-man. It seems to me that in the absence of such expressed intention, there is no other rule to adopt than the ordinary equitable rule where there is no provision. The cases of *Playter v. Abbot*, *Shaftesbury v. Duke of Marlborough*, *Stone v. Theed*, 2 Bro. C. C. 244, and *White v. White*, all depend upon their own peculiar circumstances. The case of *Allan v. Backhouse* appears to me more like the present case than any other. In that case there was a direction to renew out of the rents and profits. That was held to authorise a mortgage, so that the provision for renewal was in substance the same as in the present case, that is, out of the rents and profits, or by mortgage. It was held that the tenant for life and remainder-man must contribute according

to the actual benefit derived by them from the renewal. As to the case of *Milsington v. Lord Portmore*, it does not seem to have been argued that the tenant for life and remainder-man must contribute. The question of contribution was probably considered of little importance, for it was clear that the tenant for life was to pay a very large proportion of the fine; for the lease was renewable every seven years, and there had been no renewal for sixteen years.

It is true, as stated in the above opinions, that *The Earl of Shaftesbury v. The Duke of Marlborough* was determined according to the intention collected from the whole will, but then we can find nothing in that will against a contribution by the remainder-man which is not in the will of William Banner. The will before us wants the strong feature of *Playter v. Abbotts*,—a power to sell. It was not the intention of the testator that any part of the property should be sold or lost. The testator, it will be observed, created several estates for life, which might be expected to endure many years, and they did last upwards of forty; so that it was probable several renewals would be necessary, and four were in fact made. Now it is not a probable intention to impute to the testator that he intended his trustees to heap mortgage upon mortgage, and to transfer little better than a *damnosa hæreditas* to the remainder-man; we should rather say, that the inference is strong that he contemplated only temporary loans, and that he looked to the annual rents as the source from which the successive renewal fines should be supplied. We, however, allow that the will of William Banner cannot in this respect be distinguished from that in *Allan v. Backhouse*, and consequently that the same arrangement should be made.

Before we conclude, we must take our practical view.—Seeing the difficulties with which the subject is surrounded, the conveyancer, when he is aware that renewable leaseholds are included in a devise to several parties in succession, should make a clear and unambiguous provision for the renewal of the leases. It is not enough to say that the tenants for life and other cestuis-que trust shall take subject to the renewal of the leases, for that leaves the question of contribution between those parties undecided. The best plan probably is, that the trustees should be directed to insure

the existing lives if practicable, and also the new lives to be added from time to time, with a power to raise any sum of money for the purpose of renewals, for fines or expenses, by mortgage, and that the premiums of insurance and the interest of the mortgage debt, and also one-tenth of the loan for the time being, shall be paid yearly out of the annual rents, and then the residue of such rents may be disposed of.

W. C. W.

ART. VI.—THE CONFLICT OF THE ENGLISH AND SCOTCH LAW
ON THE SUBJECT OF MARRIAGE.

WHEN in 1840 the opinion of the judges on the case of *Birt-whistle v. Vardill* was delivered by Lord Chief Justice Tindal, to the effect that a person legitimated in Scotland by the marriage of his parents after his birth could not succeed to real estate in England, Lord Brougham renewed the expression of the doubts he had formerly declared on the matter,¹ and then added: "One thing, my lords, has struck me, that, supposing your lordships shall ultimately be of opinion that you ought to decide in favour of the defendant in error, and to affirm the judgment of the Court below, it will be absolutely necessary that the legislature should interfere in order to allay the evils which will arise out of the conflict of law respecting personal status in the two parts of the kingdom."

If there was then any reason for determining on this interference, still more strong are the reasons that now require its adoption. Yet a year has been allowed to pass away without even an effort to remedy the evils thus judicially declared to exist. A short notice of some of them will not be uninteresting.

It is often a subject of wonder and complaint, that the ordinary interests of the public are but ill considered by legislators. When this negligence directly affects small bodies of men, they exclaim loudly against it, and petitions and remonstrances follow each other with a rapidity which knows no check until a remedy is afforded and the object they desire

¹ In the year 1835; ² Clark & F. 582.

is attained. If the interests thus affected are widely extended or the persons concerned in them are wealthy or of high rank, the matter becomes one of political importance, and the instruments of party warfare are employed to secure their triumph. Such is the ordinary course of the business of political life. But political life, like the laws of physical nature, admits of a paradox, and though the interest which is widely extended insists upon a deferential attention to its wishes, that which is universal, that which affects the happiness, not only of a class but of a nation, nay, of all nations, is either not legislated upon at all, or is so in a crude, hasty and partial manner, being treated with much less consideration than would be devoted to a bill to sell an estate, or to create or dissolve a turnpike trust. Such at least has been the case till a very recent period with the labours of parliament on the subject of marriage. The proportion of care and thought bestowed on this subject has been inversely to its importance and to the universality of the interests and sympathies affected by it.

Up to the time of Henry VIII. the legislature seems to have feared or declined to interfere with the church authorities on the subject of marriage, and considering the style in which the subject was afterwards dealt with, it might have been quite as well had this matter been still permitted to pass unnoticed by the parliament. But the personal convenience of the sovereign decreed that it should have a different fate. Accordingly in the reigns of the Tudor princes, parliament again and again declared its supreme will on the subject, but on each occasion employed its high authority, not so much with the view of laying down the best rules to regulate the transaction of the most important affair of life, as with that of satisfying the momentary caprices of one ruler, or quieting the alarms of each of his three children and successors. In Scotland as in England marriage appears to have been left for centuries to the sole authority of the church, and the law neither seems to have provided for, nor even contemplated the proper regulation of the interests that might arise out of it. Yet by the common law of both countries, marriage is simply a civil contract, Erskine, Book I. tit. 6, and Blackstone Comm. Vol. 4, p. 433. The latter writer adds, "the holiness of the matrimonial state is left entirely to the ecclesi-

astical law. And taking it in this civil light the law treats it as it does all other contracts; allowing it to be good and valid in all cases where the parties at the time of making it were in the first place *willing* to contract; secondly, *able* to contract, and lastly, actually *did contract* in the proper forms and solemnities required by law."

Now the first and last of these things are mere matters of fact, on which legislation could not interfere, except so as to declare what should be a legal manifestation of intention; but the second of them is one on which there should have been in every country a clear, indisputable, and complete legislative enactment. Such an enactment has not been made even up to this day. For though we have in England, within these few years, seen a law passed,¹ which affected to settle in some cases at least the question of ability to contract marriage, it is remarkable that that law, with a most culpable indolence, left the definition of capacity to be gathered from the decisions of the canon law, instead of declaring of its own authority what should be the degrees within which it prohibited and what those within which it permitted marriage. The existing general marriage act itself (6 & 7 Will. 4, c. 85) leaves this matter equally unsettled.

The want of any well defined law on the subject of marriage, at once the effect and the evidence of crude legislation, was likely to continue unnoticed until the intercourse between different parts of this country, or between this country and others, should give rise to circumstances that would make all men feel the folly of leaving the law of marriage and its consequences in this unsettled state. Within a comparatively short time these circumstances have arisen and have succeeded each other with great and unexpected rapidity. We now stand with relation to Scotland in a most curious position. The conflict of laws of the two countries may in several instances confer a different character on the same individual, as he happens to be on the north or the south side of the Tweed. We may have a peer of the realm admitted into the House of Lords, and sitting and voting on the lives and properties of his fellow subjects, and doing this by virtue of being accord-

¹ 5 & 6 W. 4, c. 54

ing to the Scotch law the legitimate heir of the last peer, while the English law acknowledging his legitimacy as a personal status will give him that peer's personal property, but absolutely refuses to let him inherit as the heir of the last peer one single acre of that peer's English estates.

But this conflict of our laws (the two nations being governed by one sovereign and one parliament) is not confined to a case like that just mentioned, but extends to other cases, and involves some strange and curious consequences. Numerous are the discrepancies, the unsettled discrepancies, between the laws of the two countries on all matters relating to marriage and legitimacy. Thus, in the instance of the very statute we have before referred to (5 & 6 W. 4, c. 54), the English law holds or is supposed to hold,¹ that the marriage of a man with the sister of his deceased wife is void, the Scotch law does not in the least degree interdict such a marriage, and if two English parties choose to domicile themselves in Scotland for a period sufficient to give them a title to the rights incident to a legally established domicile, their marriage would unquestionably be good there:² it would then it seems be good here,³ although, if attempted to be celebrated here in the first instance, it would decidedly be void.

If the principle of the English law is worth anything, it is worth being protected from the consequences of such a wilful evasion, committed within the jurisdiction of the very parliament by whose authority the law exists. If it is not worth anything, the painful doubts it occasions in the minds of conscientious persons should be removed by the erasure of the absurd enactment from the statute book. While the laws of the two countries are suffered to remain in their present state, they exhibit to the world this ridiculous state of things, that in one part

¹ The statute only says that "marriages between persons within the prohibited degrees of consanguinity or affinity" shall be void, and many doubts have recently been raised whether the marriage of a man with his deceased wife's sister comes within that description; see ante vol. 20, p. 371.

² The 5 & 6 W. 4, c. 54, does not extend to Scotland, s. 3.

³ *Compton v. Bearcroft*, Bull. N. P. 114, *Doe d. Birtwhistle v. Vardell*, Dom. Proc. 1840, where the rule was broadly laid down that a marriage, which was good by the laws of the country where it was performed, would be recognized as conferring a personal status all over the world, though in a particular country, so far as landed property was concerned, the *lex loci rei sitæ* might prevent some of the ordinary consequences of that status.

of the same kingdom a marriage is prohibited and invalid, while in another part it is permitted and valid, and if the ceremony is performed in the latter the marriage is not only good there, but is valid in the part of the kingdom where it is prohibited, and is not a bit the less valid though the natives of the part where it is prohibited have gone into the other for the very purpose of evading and defeating the prohibition. In this way the law hastily made or made only for a partial object interferes with the comforts of social life, sets itself up in contradiction to the commonly received opinions and practices of men, and imposes heavy penalties for the infraction of its capricious arbitrary orders, and yet at the same time affords an opportunity, if it does not actually offer a premium, for their infraction. If this state of law was true with regard to two states independent of each other, men must submit to a condition of things of which it would be beyond their power to enforce the improvement. But when this is the case with regard to two portions of the same empire closely connected, governed by the same authority, having the same legislature, and possessing the means therefore of harmonizing the laws which regulate them, the negligent indifference of the legislature to a subject of such importance is equally matter of wonder and of blame.

But if we blame this inattention to the state of the law in regard to a particular sort of marriages, what shall we say when we consider the different laws that regulate in the two countries the whole subject of marriage itself? In England a marriage cannot be had without the performance of certain ceremonies established by statute, and if the parties cohabit before marriage and a child is born, that child receives at its birth a stamp of illegitimacy, which in all cases for the purpose of inheriting land, and in some cases for all purposes whatever, can never be removed. In Scotland, on the contrary, the marriage may be valid in law for all purposes whatever "in one of three ways by which consent may be proved, for consent alone makes the marriage. The first, is consent in fact *per verba de præsenti*; secondly, consent partly by presumption of law, and partly in fact, as when the parties live together as married, and are in habit and repute husband

and wife. The third is that, where there is a promise or engagement to marry *de facto* with *copula* following."¹ Let us add to this summary of the law the statement that a marriage in Scotland between the parents of children born before such marriage legitimates the children. If each of these systems could affect property and honours in the single country where it was established, the difference between them might be comparatively unimportant; but in consequence of the frequent intercourse now so happily existing between the countries, the rules which create and regulate the married state in one become of the utmost importance to the happiness and interests of the people of the other. And by the laws which now exists, we distinctly affirm that injustice is done to both countries.

Two cases that have recently been decided in the House of Lords, taken in conjunction with the decision in *Birtwhistle v. Vardill*,² may suffice to establish the position. In one of these it appeared that a Scotch gentleman of old family and of large fortune did, in the early part of the French revolutionary war, raise a regiment, and place it at his majesty's disposal. The king ordered the regiment into England, and stationed it at Chester. The colonel accompanied it thither, and took with him from Scotland a young woman of great beauty, but of humble parentage, to whom he had become deeply attached. They cohabited, and at different intervals of time children were born. Family pride, or some such motive, induced the colonel to allow these children to be treated as illegitimate, and he actually permitted himself on each occasion of a birth to be summoned by the parish officers, and to give bonds for indemnifying the parish, should it be called on to support the child. It does not seem that the children were ever likely to be chargeable, but the proceeding shows how the colonel thought fit to treat them during the early years of their lives, and how completely at that period the condition of illegitimacy was fixed upon them. After some

¹ Per Lord Brougham, C., *Honeyman v. Campbell*, 2 Dow & Clark, 281. See also *Dalrymple v. Dalrymple*, 2 Hag. 61.

² Which establishes that an *ante natus* cannot by the subsequent marriage of his parents be made the lawful heir, so as to succeed to English estates.

years he was relieved from the duty of commanding the regiment, and returned to Scotland, taking with him the mother of his children and the children themselves. Some time after his arrival in Scotland he married her. Both the parties were Scotch—neither had been married in the meantime, and therefore by the law of Scotland the marriage there celebrated was valid and the children were legitimated, provided that the fact of his long residence in England and the birth of the children there had not destroyed the Scottish character of the parties, and of the transaction. The matter was debated in the Scotch Courts, and the marriage was held capable of conferring legitimacy on all the children. The decision of the Scotch judges was confirmed by the House of Lords, which proceeded on the ground that the residence of the colonel in England, being a residence under the military orders of the sovereign and for the public service, could not be deemed the creation of a domicile in a foreign country—that the colonel must therefore be considered in law to have been domiciled in Scotland during the whole period of his actual residence in England, and consequently his marriage must be taken as a Scotch marriage between Scotch persons, must be governed by the laws of his place of domicile, and must there receive all the incidents properly belonging to a Scotch marriage.

In the course of the argument a question was agitated as to the loss of Scotch domicile by the mother during her long residence in England, but it was considered that the domicile of the husband at the time of the marriage being Scotch absorbed that of the wife, and rendered it incapable of affecting the ultimate rights of the parties. By this decision the children were all legitimated in Scotland, and could succeed, in the event of the intestacy of their father, to his real and personal estates. Nay more, they would succeed to him as heirs of an entail of landed estate, the subsequent legitimation having the effect of rendering them to all intents and purposes as perfectly and completely legitimate as if each and every of them had been born after a duly solemnized marriage between their parents. Fortunately for them their father's landed possessions were confined, we believe, to Scotland—he had no English estates, else, according to the case of *Birt-*

whistle v. Vardell, they would have been incapable of succeeding to these estates. Though legitimate in Scotland for all purposes—and so recognized in England for all purposes relating to personalty, they would, with regard to the capacity to inherit real estate, have been still treated by the law of this country as bastards. So that as Lord Brougham, when speaking of the conflict of English and Scotch law on the subject of marriage and divorce, forcibly observed in the case of Warrender v. Warrender,¹ the result is “the greatest embarrassment to their rights. For what can be more embarrassing than that a person’s *status* should be involved in uncertainty, and should be subject to change its nature as one man goes from place to place; that he should be married in one country, and single, if not a felon, in another; bastard here and legitimate there. The utmost inconvenience to the Courts—for what inconvenience can be greater than that they should have to regard a person as married for one purpose and not for another; single, and a felon if he marries, a few miles to the southward; lawfully married if the ceremony be performed a few yards to the northward; a bastard when he claims land; legitimate when he sues for personal succession; widow when she demands the chattels of her husband—his concubine when she counts as dowable of his land.”

The inconveniences, to give them no stronger epithet, which result from the conflict of the Scotch and English laws appear bad enough when we consider them as happening under circumstances such as those existing in the case of the colonel before mentioned. But connected with that case there seems to be this consolation, that there would not be many men likely to be placed in similar circumstances, since there are not always Scotch colonels capable of retaining their Scotch domicile, in virtue of their absence from Scotland being occasioned by the orders of the sovereign and the necessities of the public service. We might therefore be led to suppose that the cases in which this conflict would arise would be but few. This consolation has but little weight. Another case also recently decided in the House of Lords discloses a state of facts likely to happen at any time to any

¹ 2 Clark & Fin. 548.

man in any station of life, and capable therefore of giving to the doctrine founded upon them the most extensive application.

A Scotch gentleman of old family and good fortune was not on the best terms with his mother—they seemed to have had some differences respecting the occupation of the family mansion: he took the opportunity, afforded by the intended visit to London of his parish minister, to change the scene. He came to London with the minister; he came avowedly only for a six weeks' visit. The minister returned—the gentleman stayed—he found London agreeable; he wished to extend the period of his visit. Still it was only called a visit. He became attached to a young Englishwoman; he took a house for her; he inhabited this house with her; but during the whole period of his stay he wrote from time to time, generally every week, sometimes every two or three days, letters to his mother, to his bailiff, to his steward, and to his friends, declaring that he was “just returning,” that he should be “in Scotland in a few days,” and in two or three instances directing his house there to be prepared for his reception. Being dissatisfied with a steward he dismissed that steward, and wrote in the letter containing the dismissal a declaration that he would not have any other person in the situation, for that he meant to be his own steward and to occupy himself with the management of his own estate. And in fact it did not appear that he ever afterwards appointed a steward. But time rolled on, month succeeded month, he continued to write as before to Scotland, but he remained in England. Still however these declarations of constant intention to return “in a few days” were continually sent to Scotland. One child, a daughter, was born to him in England; and some three or four years after the birth of that child he married the mother in London, and about a year after the marriage, namely in 1802, took her to Scotland. His wife died, and many years afterwards, with a view to secure his daughter's fortune, he brought a declarator of marriage in the Scotch Courts.

The Scotch judges differed in opinion on the question of domicile, six thinking that the domicile of the father was

throughout Scotch, and therefore that the marriage was to be decided by the Scotch law, and consequently that the child was legitimate : six were of opinion that the Scotch domicile was lost and an English domicile acquired; that the marriage was therefore an English marriage, and the child illegitimate; and the thirteenth judge thought that the question of the domicile of the father had nothing to do with the matter, which was to be decided entirely by the law of the place where the child was born. But all except the last learned judge held, that if the Scotch domicile had not been lost the child was legitimate. The case was brought by appeal to the House of Lords, and by that House the doctrine of the legitimacy of the offspring was upheld. It was upheld on the ground of the domicile of the husband, which the Lords were of opinion had not been lost in consequence of the protracted stay of the father in this kingdom, such stay bearing throughout the character of a temporary visit, the conduct and declarations of the father never exhibiting an *animus remanendi*.

One of the arguments adduced in opposition to the application of the doctrine of domicile, as governing cases like these, was, that it would enable two English parties, after living in concubinage for a number of years, to defeat the English law by going to Scotland, acquiring a legal domicile there, and then marrying, so as to legitimate their previously born children. There is no doubt that as the law now stands, such would be the result, so far at least as regards personal estate. But then if the English law could not defend, it could at least avenge itself, so that admitting the personal status of the children, which had been thus acquired in fraud or defiance of its positive provisions, it would yet refuse them some of the rights of legitimate children—it would concede to the authority of that status the succession to personal, while it would refuse the inheritance of real property. The interference of the legislature might easily settle these differences. It would not be too much to say, that it was the duty of the legislature no longer to leave them unsettled. The extent of injury to the interests of individuals from the present state of the law is not easily to be calculated. The right of succession to the per-

sonal property of an intestate may not in one case be worth the trouble of asserting, the bulk of his wealth having consisted of landed estates. In another case the landed estate may be a 40s. freehold, while hundreds of thousands of pounds in the funds may become the property of those who can establish a legal title to the personal status of legitimacy.

There is one more matter on which this conflict of Scotch and English law acts most mischievously, namely, that of the efficiency of divorces pronounced by the Scotch Courts with regard to English marriages. The only point that has been distinctly settled on the subject, is that where a marriage takes place in England between a domiciled Scotchman and an Englishwoman, such marriage shall be deemed a Scotch marriage, so as to enable the parties to proceed in the Scotch Courts for a divorce. The case of *Warrender v. Warrender*¹ goes no further, and, deciding that under such circumstances the parties are competent to sue for a divorce, it declares nothing whatever as to the validity of a divorce so obtained for any purposes purely English. Indeed Lord Brougham's opinion seems to shew that a Scotch divorce would be good for nothing in England, for he says, "As there would be nothing legally impossible in a marriage being good in one country, which was prohibited by the law of another, so if the conflict of the Scotch and English law be quite irreconcilable, there is nothing legally impossible in a divorce being valid in one country, which the Courts of the other may hold to be a nullity."

Lolley's case,² there so often referred to, shews that a purely English marriage, that is a marriage between two English persons, domiciled in England, cannot be dissolved by a divorce pronounced in the Courts of Scotland, or indeed of any foreign country, at least for English purposes, while for Scotch purposes it would be completely effective. In this way English married persons may be divorced in Scotland, and may marry again to other persons, and in that country live with impunity and credit, being received as lawfully married persons into any society, but if after such second marriage, they are caught

¹ 2 Clark & F. 488. See Lord Brougham's judgment, p. 540, 541; and Lord Lyndhurst's, p. 558.

² Russ. & Ryan's Cr. C. 237; 2 Clark & F. 567; n.

across the border, they will be in peril, as Mr. Lolley was, of a sentence of transportation for bigamy.

In *Macarthy v. De Caix*,¹ Lolley's case was distinctly adopted by Lord Brougham, who, sitting in the Court of Chancery, held on its authority that a sentence of divorce pronounced by a foreign court cannot defeat the rights acquired by parties (one of whom in that case was a Dane) under a marriage solemnized in England. Though his lordship has since, in *Birtwhistle v. Vardell*, intimated some doubt on the authority of this rule, it has been affirmed by the House of Lords. If such is the rule of law in this country, as to the indissolubility of an English marriage by a foreign sentence of divorce, what would be the consequence in a case such as that which we are now about to mention?

A., an English subject, marries B., another English subject, in Scotland, B. having been previously married in England and divorced in Scotland. A., afterwards being informed that B.'s divorce was invalid, on the ground that a Scotch divorce cannot dissolve an English marriage, intermarries with C. in France, and then returns to England. A. is entitled to both English and Scotch property. Will A.'s children by this marriage with C. be legitimate both in Scotland and England; or will they be bastard in Scotland and legitimate in England? We incline to the latter alternative. And yet this would be a cruel hardship on these children, whose parent had bona fide acted upon a rule laid down by all the judges of England, affirmed by the House of Lords, the supreme tribunal both for Scotland and England, and enforced against the competency of the Scotch Courts, so far as regards England, by the authority of that very House of Lords.

All this confusion and all the injustice which is its necessary result, are occasioned by the want of the adoption of some great principle, recommended by all the greatest writers, adopted in some countries, and shewn to be necessary in all by a too frequently recurring experience. The State of Massachusetts, for instance, allows a marriage or a divorce, good by the laws of any particular country, to be binding in that state, and thus avoids all this uncertainty and confusion. The

¹ 2 Russ. & Myl. 614.

number of persons injuriously affected by this conflict of law in England and Scotland is greater than is imagined. They conceal the knowledge of that evil which is without remedy, because it is inflicted by the law; and they bury in silence those complaints for which they cannot obtain sympathy, except by proclaiming themselves the objects of a legal degradation. Is it too much to say that they ought no longer to be exposed to bear such a painful condition?

While thus appearing to recommend that the law of England should adopt a principle which would render it in accordance with the laws of Scotland and of the nations around it upon a matter of the very greatest possible importance, we cannot refrain from referring to the peculiar law of Scotland on the subject of the means and mode of contracting marriage, as also requiring alteration.

The attachment of the Scotch to their ancient customs is proverbial, but so is their good sense, and if they see reason to believe that their present laws, to which we have already referred, are not fitted to the wants and habits of this age, they are too enlightened pertinaciously to insist on their continuance. Let us therefore consider the policy of the existing law of Scotland on this point. Into the question of the policy of that law as affecting public morals we are not now about fully to enter. But it may be permitted us to observe, that the principle on which the present law at once strikes the mind as objectionable, is one as to the mischievousness of which, all were agreed in the discussions on the Poor Law Amendment Bill. The law now permits, and indeed encourages in the mind of the women, the hope that the man, by a final act of justice or of grace, may render her, in the homely phrase of both countries, "an honest woman," and may legitimize her children. Does not this at least weaken her resistance to the arts of a seducer, or the promises of a profligate or careless man? The old poor law, by presenting to a putative father the alternative of payment, (which by a poor labouring man was often impossible to be adopted), or that of marriage, was believed by all who had examined into the matter to operate as a premium on an easy surrender of the female person, the very hope of marriage, even a forced marriage, producing

that effect, and by common consent that part of the old system was abrogated. In the number of faults laid to the charge of the new Poor Law Act, we have never seen this change of system included. Does not the Scotch law hold out the same hope as did the old poor law, and is it not in that respect equally impolitic and unwise? Is it not an evil that the question of the title to succeed to property should remain for years in doubt and uncertainty, subject to be altered at the whimsical caprice of a particular person, who may thus in one moment destroy expectations most reasonably entertained, and entertained partly in consequence of his own conduct, through a long course of years, and acted upon by a great number of persons? Is it not also an evil that women should for years be neglected, and children (who may be afterwards made entitled to large fortunes) left without education, and in some instances without even sufficient nutriment? This was the case in *Honyman v. Campbell*, where the man never would have borne the character of father, had it not been for the facilities for secret marriages given by the Scotch law. The present conflict of the laws of the two countries on the subjects already indicated ought certainly to be terminated; nor can it be truly asserted that some change in the mode and means of contracting marriage in Scotland is altogether unworthy of notice. At all events, if church formalities are to be dispensed with, the creation of a relation so important as that of marriage ought in no instance to be permitted without some settled form of words in writing, attested by the signature of both parties. The present Scotch system is the relic of a former age, and it stands among the institutions of these times, like the Egyptian pillar in the square at Paris, a monument of felicitous preservation, but having nothing whatever in harmony with a single thing near it, and fit to excite the wonder, but scarcely the approbation, of any but the most unreflecting.

C. K.

ART. VII.—THE LAWS AGAINST BLASPHEMY. MR. SERJEANT
TALFOURD'S DEFENCE OF MOXON.

Speech for the Defendant in the Prosecution of The Queen v. Moxon, for the Publication of Shelley's Works, delivered in the Court of Queen's Bench, June 23, 1841, and revised by T. N. Talfourd, Serjeant at Law. London. 1841.

THIS speech and prosecution form an unanswerable argument for a prompt revision of the laws against blasphemy, which, opportunely for the purpose, have just been digested and discussed by the Criminal Law Commissioners. Their views upon the subject are thus explained :

“ Laws for the punishment of offences against religion generally are justifiable on mere temporal grounds upon two principles. In the first place, religion, by enforcing moral conduct, and applying to that object some of the strongest motives that operate on human nature, is so effectual an assistant in securing a general obedience to social laws, that actions tending directly to expose it to ridicule and contempt, and thus to weaken its authority with the ignorant and unthinking, are mischievous to the community, and on that account may properly be repressed by penal enactments. Secondly, as the great mass of the inhabitants of civilized countries regard religious faith, in one form or other, as of vital interest and importance, *the criminal law may properly be employed to protect the feelings and opinions of the community on this subject from wanton insult.* Upon these two principles, as it appears to us, the interference of the penal law in matters of religion is to be justified ; and we think that rules framed strictly with reference to these principles neither invade the rights of opinion and legitimate discussion, nor endanger any general or particular interests which can properly be protected by the criminal law.

“ Upon these principles there can be no doubt that open blasphemies against God and the wanton utterance of reviling and contumelious language respecting Christianity, ought to be prevented by the criminal law of every Christian country. In times of gross superstition such offences were punished as dangerous to society by reason of the temporal disasters and calamities which were supposed likely to result from the pro-

vocation and insult offered to the Deity. Even the later Roman law gives as the reason for its severe denunciation of blasphemy that '*propter talia delicta, et fames, et terræ motus, et pestilentia fiunt.*'¹ As more rational opinions upon the subject of religion began to prevail in Europe, and the absurdity of this doctrine became acknowledged, a disposition arose among criminal jurists to conclude, from the falsehood and folly of the principle on which laws of this kind had been anciently arrested, that the laws themselves were altogether unnecessary and that such offences were exclusively of ecclesiastical cognizance. In accordance with this notion, most of the penal systems of modern Europe contain no provisions against the crime of blasphemy. It appears to us that these omissions are founded upon mistaken views. It is true that the Supreme Being cannot be considered as the object of an injury in the same sense in which mankind are injured by insults and calumnies; but a man who openly and contemptuously reviles the Deity or religion, commits an offence which contains the two great incidents of municipal crime, namely, a mischievous intention or malice in the offender, and the infliction of serious injury to society, from the recurrence of which the criminal law is the only efficient protection. Blasphemy, according to the primitive meaning of the term, which implies insulting and opprobrious language, not only displays a mischievous intention in those who utter it, and a wanton disregard of the religious feelings of others, but is injurious to the community in the way of example, and as affecting the efficacy of religion as a foundation for moral conduct. It is therefore in these respects a proper subject for penal restraint."

The statement, that the penal systems of modern Europe contain no provisions against the crime of blasphemy, is not exactly in accordance with the following summary:

"Among modern laws, the French Code Pénal contains no provisions for the punishment of persons reviling God or Christianity, except where such conduct amounts to a violation of the right of religious freedom, or an interruption of the exercise of public worship. The additions made to the Code Pénal in 1825, under the head of '*sacrilege*,' have but imper-

¹ Novell. lxxvii. ss. 1 and 2.

fectly supplied this deficiency. The Prussian law punishes 'gross blasphemies of God publicly uttered, and giving general offence,' with imprisonment from two to six months; and revilings of any religious communities allowed by the state, and disturbances of divine service, are visited with a somewhat higher degree of punishment. The Austrian code declares, that 'whosoever shall blaspheme God in speeches, writings, or actions, or shall interrupt any religious exercise allowed by the state, or shall by the indecent abuse of vessels used for divine service, or otherwise by actions, speeches, or writings, publicly manifest contempt for religion,' shall be punished according to the 'degree of scandal occasioned, and the degree of malice in the offender, with heavy imprisonment, for any period between one year and ten years.' The Bavarian code makes no direct mention of blasphemy as an offence, but contains provisions for punishing a disturbance of public worship, attended by personal violence, with imprisonment for any period between one and six years, and a disturbance by opprobrious words, without personal violence, with imprisonment for any period from one month to six months. We may here observe that in none of these laws, nor in the laws of any country with which we are acquainted, excepting the law of England and those States of America which have adopted the English common law, is it declared to be a crime simply to deny the truth of the doctrines of natural or revealed religion; offences of this class being invariably made to consist in the use of indecent, railing, or scurrilous language on such subjects."

In other words, the framers of all modern systems, except our own and those founded on it, have legislated with reference to this most embarrassing and important subject with exclusive reference to the second of the two principles laid down in the Report. They have sought to protect the feelings and opinions of the community from wanton insult, but they have made no attempt to prevent the established faith from being questioned. Thus, if a man were to stick up an offensive placard in his shop windows, or take any other mode of forcing his opinions upon the public in a manner calculated to excite just indignation, they would punish him; but

they would not interfere with a book published in the ordinary manner, however rough, free, or uncompromising the tone. It is the fashion, a very silly one, to suppose that respect for religion and morality is limited to Great Britain and its dependencies. It may therefore be as well to show that the example of foreign nations is in strict accordance with the views of English divines of eminence.

Dr. Lardner, the antagonist of Woolston, writes thus to the Bishop of Chichester :

" Your lordship freely declares, he, Woolston, ought not to be punished for being an infidel, nor for writing at all against the Christian religion, which appears to be a noble declaration. If the governors of the church and civil magistrates had all along acted up to this principle, I think the Christian religion had been before now well nigh universal ; but I have supposed it to be a consequence from this sentiment, that if men have an allowance to write against the Christian religion, there must also be considerable indulgence as to the manner likewise. This has appeared to me a part of that meekness and forbearance to which the Christian religion obliges us, who are to reprove, rebuke, and exhort with all long suffering. The proper punishment of a low, mean, indecent, scurrilous way of writing, seems to be neglect, contempt, scorn, and general indignation. Your lordship has observed extremely well, that this way of writing is such as may justly raise the indignation and resentment of every honest man, whether Christian or not. This punishment he has already had in part, and will probably have more and more, if he should go on in his rude and brutal way of writing. And if we leave all further punishment to Him to whom vengeance belongs, I have thought it might be much for the honour of ourselves and of our religion ; but if he should be punished further, the stream of resentment and indignation will turn, especially if the punishment should be severe ; and it is likely that a *small* punishment will not suffice to engage to silence, nor to an alteration in the manner of writing."

Woolston was prosecuted for the work in question, his Discourses on the Miracles ; and the judges, going somewhat beyond what the occasion warranted, are understood to have decided that the law of England punishes every general denial of the truths of revealed and (by a parity of reasoning) natural religion. Nor was this a new doctrine, Lord Hale having held the same in Taylor's case (A. D. 1676), on the ground that

Christianity was "parcel of the law of England," a dictum which is made the subject of the following just observations by the Commissioners:

"It appears to us that the expression can only mean either that as a great part of the securities of our legal system consist of judicial and official oaths sworn upon the Gospels, Christianity is closely interwoven with our municipal law; or that the laws of England, like all municipal laws of a Christian country, must, upon principles of general jurisprudence, be subservient to the positive rules of Christianity. In this sense Christianity may justly be said to be incorporated with the law of England, so as to form parcel of it; and it was probably in this sense that Lord Hale intended the expression should be understood. At all events, in whatsoever sense the expression is to be understood, it does not appear to us to supply any reason in favour of the rule; for it is not criminal to speak or write either against the common law of England generally, or against particular portions of it, provided it be not done in such a manner as to endanger the public peace by exciting forcible resistance; so that the statement that Christianity is parcel of the law of England, which has been so often urged in justification of laws against blasphemy, however true it may be as a general proposition, certainly furnishes no additional argument for the propriety of such laws."

Be the common law, however, what it may, the statute is clear enough; for by the 9 & 10 Will. III. c. 32, it is enacted "that if any person, having been educated in, or at any time having made profession of, the Christian religion within this realm, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons of the Holy Trinity to be God, or shall assert or maintain that there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority, every such person shall, upon conviction, for the first offence be adjudged incapable and disabled in law to have or enjoy any office or employment, ecclesiastical, civil, or military; and if, at the time of such conviction, such person shall possess any office, place, or employment, the same shall be void." The statute then goes on to enact that if any

person shall be a second time convicted of such offences, he shall be thenceforth disabled to sue, prosecute, plead, or use any action or information in any Court of law or equity, to be a guardian, executor, or administrator, and shall be incapable of any legacy or deed of gift or to bear any office, civil or military, or benefice ecclesiastical, for ever within this realm; and shall also suffer imprisonment for three years.

So much of this statute as relates to persons denying the Trinity was repealed by 53 Geo. III. c. 160. The rest is still in force.

“It may justly be questioned,” say the Commissioners, “whether the penalties of this statute be not more severe than was necessary or even politic;” and it is a remarkable fact that it has remained a dead letter from the period of its enactment. The common law denunciation has also been permitted to slumber except on extraordinary occasions; but the recent conviction of Mr. Moxon shews that it is no longer safe to keep a dangerous law alive, under an expectation that the good sense of the public, acting through juries, will prevent it from being misdirected or abused.

Mr. Serjeant Talfourd has published his speech with the view of calling general attention to the predicament in which not merely his client, but every bookseller and librarian in the kingdom, may be placed by the strict literal enforcement of the existing prohibitions; and we shall endeavour to forward the same laudable object by quoting a few of the most striking passages.

The circumstances of the prosecution are briefly detailed in the Preface:

In the month of April 1840, an indictment was preferred against Mr. Henry Hetherington, a bookseller in the Strand, at the instance of the attorney-general, for selling certain numbers of a work entitled ‘*Haslam’s Letters to the Clergy of all Denominations*,’ sold each at the price of *one penny*, and charging them as libels on the Old Testament. The cause came on to be tried before Lord Denman in the Court of Queen’s Bench on 8th December, 1840, when the defence was conducted, with great propriety and talent, by the defendant himself, who rested it mainly on a claim of unqualified

right to publish all matters of opinion, and on the argument, that the work charged as blasphemous came fairly within the operation of that principle. Mr. Hetherington was, however, convicted, and ultimately received judgment, under which he underwent an imprisonment of four months in the Queen's Bench prison.

While this prosecution was pending, Mr. Hetherington appears to have adopted the design of becoming in his turn the prosecutor of several booksellers for the sale of the complete edition of Shelley's Works, which had been recently issued by Mr. Moxon in a form similar to that in which he had published the collected works of the greatest English poets. He accordingly commissioned a person named Holt, then a compositor in his employ, to apply for the work at the shops of several persons eminent in the trade, and thus succeeded in obtaining copies of Mr. Moxon, of Mr. Fraser, and of Mr. Otley, or rather of the persons in their employ. On the sales thus obtained, indictments were preferred at the Central Criminal Court against the several vendors, which, with a similar indictment against Mr. Marshall, doubtless preferred by the same prosecutor, were removed by *certiorari* at the instance of the defendants, and set down for trial by special juries. Mr. Moxon felt that, as the original publisher of the edition, he ought to bear the first attack; and therefore, although some advantage might have been gained by placing the case of a mere vendor before his own, he declined to use it, and entered his own cause the first of the series which were to be tried in Middlesex.

The only true and proper line of defence to such a prosecution will readily suggest itself. In legal construction, the intention of a publication is undoubtedly to be collected from its tendency; but the tendency of "Queen Mab," forming part of a collected edition of Shelley's Works in 1841, is a very different thing from its tendency as a separate poem in 1801. In the one case, the sceptical opinions were possibly printed with a view to proselytism: in the other, it is perfectly clear from the accompanying notes and explanations, that they were given to the world as matters of historical interest, to operate not as lures but warnings, to be mourned over as

indications of youthful frailty and be shunned. Nothing can well be finer than the mode in which this topic is amplified:

"The passages selected as specimens of the indicted libel are found in a complete edition of the works of Percy Bysshe Shelley—a work comprising more than twenty thousand lines of verse, and occupy something less than the three-hundredth part of the volume which contains them. The book presents the entire intellectual history—true and faithful, because traced in the series of those works which were its events—one of the most extraordinary persons ever gifted and doomed to illustrate the nobleness, the grandeur, the imperfections and progress of human genius—whom it pleased God to take from this world, while the process harmonizing his stupendous powers was yet incomplete, but not before it had indicated its beneficent workings. It is edited by his widow, a lady endowed with great and original talent, who, as she states in her preface, hastens 'to fulfil an important duty, that of giving the productions of a sublime genius to the world, with all the correctness possible, and of, at the same time, detailing the history of these productions, as they sprang warm and living from his heart and brain.' And, accordingly, the poems are all connected together by statements as to the circumstances under which they were written, and the feelings which inspired them. The 'alterations (says Mrs. Shelley) his opinions underwent ought to be recorded, for they form his history.'

"The first of these works is a poem, written at the age of eighteen, entitled 'Queen Mab;' a composition marked with nothing to attract the casual reader—irregular in versification, wild, disjointed, visionary; often difficult to be understood even by a painful student of poetry, and sometimes wholly unintelligible even to him; but containing as much to wonder at, to ponder on, to weep over, as any half-formed work of genius which ever emanated from the vigour and the rashness of youth. This poem, which I shall bring before you presently, is followed by the marvellous series of works of which 'Alastor,' 'The Revolt of Islam,' the 'Prometheus Unbound,' and the 'Cenci' form the principal, exhibiting a continuous triumph of mellowing and consecrating influences, down to the moment when sudden death shrouded the poet's career from the observation of mortals. Now the question is, whether it is blasphemy to present to the world—say rather to the calm, the laborious, the patient searcher after wisdom and beauty, who alone will peruse this volume—the awful mistakes, the mighty struggles, the strange depressions, and the imperfect victories of such a spirit, because the picture has some passages of frightful gloom."

In his speech on the Copyright Bill, which went far to decide its temporary rejection, Mr. Macaulay contended that it would be comparatively powerless as a protection to an author's representatives, because piracy could no more be prevented than poaching or smuggling; and at the same time, by a strange inconsistency, he argued that it would enable those very representatives to suppress or garble any works which they might deem injurious to morality. He dwelt strongly on the instance of Richardson, one of whose descendants, it is said, had repeatedly expressed a wish that some or all of his ancestor's works could be suppressed. This argument is introduced by Mr. Serjeant Talfourd with peculiar felicity:

"I am far from contending that everything which genius has in rashness or in wantonness produced, becomes, when once committed to the press, the inalienable property of mankind. Such a principle, indeed, seems to be involved in an argument which was recently sanctioned by the authority of a cabinet minister more distinguished even as a profound thinker and an eloquent and accomplished critic, than by political station. When I last urged the claim of the descendants of men of genius to be the guardians of their fame, as well as the recipients of its attendant rewards, I was met with denial on the plea that, from some fastidiousness of taste, or some over-niceness of moral apprehension, the hereditary representatives of a great writer may cover his works with artificial oblivion. I have asked, whether, if a poet has written 'some line which, dying, he may wish to blot,' he shall not be allowed by the insatiate public to blot it dying; and I have asked in vain! Fielding and Richardson have been quoted, as writers whose works, multiplying as they will through all time the sources of innocent enjoyment, might have been suppressed by some too dainty moralist. Now admitting that the tendency of Fielding's works, taken as a whole, is as invigorating as it is delightful, I fear there are chapters which if taken from their connexion—apart from the healthful atmosphere in which their impurities evaporate and die—and printed at some penny cost for dissemination among the young, would justly incur the censure of that law which has too long withheld its visitations from those who have sought a detestable profit by spreading cheap corruption through the land. It may be true, as Dr. Johnson ruled, that Richardson 'had taught the passions to move at the command of virtue;' and, as was recently asserted, that Mrs. Hannah More 'first learned from his writings those prin-

ciples of piety by which her life was guided ;' but (to leave out of consideration the *Adventures of Pamela*, which must sometimes have put Mrs. Hannah More to the blush) I fear that selections might be made, even from the greatest of all prose romances, *Clarissa Harlowe*, which the Society for the Suppression of Vice would scarcely endure. Do I wish them therefore suppressed? No! Because in these massive volumes the antidote is found with the bane; because the effect of Lovelace's daring pleas for vice, and of pictures yet more vicious, is neutralised by the scenes of passion and suffering which surround them; because the unsullied image of heroic purity and beautiful endurance rises fairer from amidst the encircling pollutions, and conquers every feeling but those of admiration and pity. Yet if detached scenes were, like these passages of Shelley, selected for the prosecution, how could they be defended—but, like them, by reference to the spirit, and intent, and tendency of the entire work from which they were torn? And yet the defence would be less conclusive than that which I now offer; as descriptions which appeal to passion are far less capable of correction by accompanying moralities, than the cold speculations of a wild infidelity by the considerations which the history of their author's mind supplies. In the wise and just dispensations of Providence great powers are often found associated with weakness or with sorrow; but when these are not blended with the intellectual greatness they countervail, but merely affect the personal fortunes of their possessors—as when a sanguine temperament leads into excesses—there is no more propriety in unveiling the truth, because it *is* truth, than in exhibiting the details of some physical disease. But when the greatness of the poet's intellect contains within itself the elements of tumult and disorder—when the appreciation of the genius, in all its divine relations and in all its human lapses, depends on a view of the entire picture, must it be withheld? It is not a sinful Elysium, full of lascivious blandishments, but a heaving chaos of mighty elements, that the publisher of the early productions of Shelley unveils. In such a case, the more awful the alienation, the more pregnant with good will be the lesson. Shall this life, fevered with beauty, restless with inspiration, be hidden; or, wanting its first blind but gigantic efforts, be falsely, because partially revealed? If to trace back the stream of genius, from its greatest and most lucid earthly breadth to its remotest fountain, is one of the most interesting and instructive objects of philosophic research, shall we—when we have followed that of Shelley through its majestic windings, beneath the solemn glooms of "*The Cenci*," through the glory-tinged expanses of "*The Revolt of Islam*," amidst the dream-like haziness of the "*Prometheus*"—be for-

bidden to ascend with painful steps its narrowing course to its furthest spring, because black rocks may encircle the spot whence it rushes into day, and demon shapes—frightful but powerless for harm—may gleam and frown on us beside it ?”

After reading the indicted passages, and dwelling on their vague, dreamy, mystic character, he proceeds to shew, by a reference to Milton, how difficult it will be to preserve our noblest literature from profanation, if such prosecutions are to be encouraged :

“ I cannot proceed with this defence without feeling that I move tremulously among sacred things which should be approached only in serene contemplation ; that I am compelled to solicit your attention to considerations more fit to be weighed in the stillness of thought than amidst the excitements of a public trial ; and that I am able only to suggest reasonings which, if woven into a chain, no strength of mine could utter, nor your kindest patience follow. But the fault is not mine ! I cannot otherwise even hint the truth—the living truth—of this case to your minds as it fills and struggles in my own, or protect my client and friend from a prosecution without parallel in our legal history. If the prosecutor, in return for his own conviction of publishing some cheap and popular work of alleged blasphemy—prepared, calculated, and intended by the author to shake the religious principles of the uneducated and the young,—has attempted to assail the efforts of genius, and to bring into question the relations, the uses, the tendencies of the divinest faculties, I must not shrink from entreating you to consider those bearings of the question which are essential to its justice. And if you feel unable fully to examine them within the limits of a trial, and in the atmosphere of a court of justice, yet if you feel with me that they are necessary to a just decision, you cannot doubt what your duty to the defendant and to justice is on a criminal charge ! Pardon me, therefore, if I now seek to show you, by a great example, how unjustly you would deal with so vast and so divine a thing as the imagination of a poet, if you were to take his isolated passages which may seem to deal too boldly with sacred things, and—without regard to the process of the faculty by which they are educed—to brand them as the effusions of a blasphemous mind, or as tending to evil issues. That example will also show you how a poet—devoting the noblest powers to the loftiest themes when he ventures to grapple with the spiritual existences revealed by the Christian faith, in the very purpose of vindicating “ the ways of God to men,” may seem to incur a charge like the present,

and with as much justice, and may be absolved from it only by nice regard to the tendencies of the divine faculty he exerts. I speak not of a 'marvellous boy,' as Shelley was at eighteen, but of Milton, in the maturity of his powers, when he brought all the 'spoils of time,' and the clustered beauty hoarded through a long life, to the deliberate construction of a work which should never die. His case is the converse of that of Shelley—he begins from an opposite point; he falls into an opposite error; but he expatiates in language and imagery out of which Mr. Hetherington might shape a charge as specious as that which he has given you to decide. Shelley fancies himself irreligious, and everywhere falters or trembles into piety; Milton, believing himself engaged in a most pious work, is led by the tendencies of his imagination to individualise—to adorn—to enthrone—the Enemy of God; and to invest his struggles against Omnipotence with all the nobleness of a patriotic resistance to tyranny, and his suffering from Almighty justice with the graces of fortitude. Let it not be urged that the language which his Satan utters is merely to be regarded with reference to dramatic proprieties—it is attributed to the being in whom the interest of his poem centres; and on whom admiration and sympathy attend as on a sufferer in the eternal struggle of right against power. Omnipotence becomes tyranny in the poet's vision, and resistance to its requisitions appears the more generous even because hopelessly vain."

Gibbon affords another apt illustration; and there are few of the ancient classics from which a keen critic might not cull passages, objectionable both on the ground of religion and morality.

"And are you prepared to succumb to this new censorship? Will you allow Mr. Hetherington to prescribe what leaves you shall tear from the classic volumes in your libraries? Shall he dictate to you how much of Lord Byron—a writer far more influential than Shelley—you shall be allowed to lend to your friends without fear of his censure? Shall he drag into Court the vast productions of the German mind, and ask juries to decide whether the translator of Goethe, Schiller, Wieland, and Lessing—dealing with sacred things with a boldness to which we are unused—are guilty of crime? Shall he call for judgment on that stupendous work, the 'Faust,' with its prologue in Heaven, and ask a jury to take it in their hand, and at an hour's glance to decide whether it is a libel on God, or a hymn by Genius to his praise? Do you not feel those matters are for other seasons—for another

sphere? If so, will you, in the dark—without knowledge—without evidence—sanction a prosecution which will, in its result, impose new and strange tasks on juries who may decide on other trials; which may destroy the just allowance accorded to learning even under absolute monarchies; and place every man who hereafter shall print, or sell, or give, or lend, any one of a thousand volumes sanctioned by ages, at the mercy of any prosecutor who for malice—for gain—or mere mischief, may choose to denounce him as a blasphemer?

“And now I commend into your hands the cause of the defendant—the cause of genius—the cause of learning—the cause of history—the cause of thought. I have not sought to maintain it by assailing the law as it has been expounded by courts, and administered by juries; which, if altered, should be changed by the authority of the legislature, and neither by the violation of oaths, nor by the machinery which the prosecutor has employed to render it odious at the cost of those whom he himself contends to be guiltless; but I have striven to convince you, that by a just application of that law, you may hold this publication of the works of Shelley to be no crime. It has been fairly contended that Mr. Moxon is a most respectable publisher; one who has done good service to the cause of poetry and wisdom; and one who could not intentionally publish a blasphemous work, without treason to all the associations which honour his life. Beginning his career under the auspices of Rogers, the eldest of a great age of poets, and blessed with the continued support of that excellent person, who never broke by one unworthy line the charm of moral grace which pervades his works, he has been associated with Lamb, whose kindness embraced all sects, all parties, all classes, and whose genius shed new and pleasant lights on daily life; with Southey, the pure and childlike in heart; with Coleridge, in the light of whose Christian philosophy these indicted poems would assume their true character as mournful yet salutary specimens of power developed imperfectly in this world; and with Wordsworth, whose works so long neglected or scorned, but so long silently nurturing tastes for the lofty and the pure, it has been Mr. Moxon's privilege to diffuse largely throughout this and other lands, and with them the sympathies which link the human heart to nature and to God, and all classes of mankind to each other! Reject then, in your justice, the charge which imputes to such a man, that, by publishing this book, he has been guilty of blasphemy against the God whom he reveres! Refuse to set the fatal precedent, which will not only draw the fame of the

illustrious dead into question before juries, without time to investigate their merits ; which may not only harass the first publishers of these works, but which will beset the course of every bookseller, every librarian, throughout the country, with perpetual snares, and make our criminal courts the arenas for a savage warfare of literary prosecutions ! Protect our noble literature from the alternative of being either corrupted or enslaved ! Terminate those anxieties which this charge so unprovoked—so undeserved—has now for months inflicted on the defendant and his friends, by that verdict of *not guilty*, which will disappoint only those who desire that cheap blasphemy should have free course ; which the noblest and purest, and most pious of your own generation will rejoice in ; and for which their posterity will honour and bless you ! ”

Lord Denman left the question fairly and broadly to the jury, stating his own opinion that prosecutions of the kind were to be deprecated rather than encouraged, but adding that it was the jury's duty to enforce the law without reference to its expediency. At the same time his lordship told them distinctly that the passages must be interpreted by the context, and that the tendency of the publication must be considered with reference to the period, the purpose, and the form. The jury, after remaining about an hour in consultation, found the defendant *guilty*, to the surprise and regret of the bystanders..

It might be dangerous to propose any essential alteration in the existing law, but there can be no harm in providing that no prosecution shall hereafter be instituted by or at the instance of any private person. Surely, in the present state of the public mind, the fullest discretion regarding such a subject may be safely vested in the law officers of the crown.

H.

DIGEST OF CASES.

COMMON LAW.

[Comprising 11 Adolphus & Ellis,^o Part 2; 6 Bingham's New Cases, Part 3; 1 Manning & Granger, Part 4; 8 Scott, Part 3; 1 Scott's New Reports, Part 4; 2 Scott's New Reports, Part 1; 7 Meeson & Welsby, Part 2; 9 Dowling's Practice Cases, Parts 2 and 3; and a selection from 9 Carrington & Payne, Part 4:—all cases included in former Digests being omitted.]

ACTION ON THE CASE. See PLEADING, 3.

AFFIDAVIT.

1. (*By marksman—Jurat.*) Where an affidavit is made by a marksman, the fact of his having marked it must appear in the jurat.—*Wilson v. Blakey*, 9 D. P. C. 352.
2. (*Staleness.*) The Court will not reject affidavits merely on the ground of their staleness.—*Wynne v. Wynns*, 9 D. P. C. 396.
3. (*Jurat—Erasure.*) Where the date in the jurat had been struck out with a pen, and the right date introduced, the affidavit was held inadmissible.—*Chambers v. Barnard*, 9 D. P. C. 557.
4. (*How to be entitled, in cause removed by certiorari.*) Where a plaint is removed by certiorari out of a Court of Requests into the Court of Queen's Bench, the affidavit used on an application in the cause so removed is properly intituled in the Queen's Bench.—*Franks v. Wicks*, 9 D. P. C. 489.

AGREEMENT.

(*Conditions precedent and concurrent—Pleading.*) Where an agreement stipulates for the performance by both of the parties to it of several acts, neither of which per se goes to the whole consideration, the performance of any one of them will not be construed to be a condition precedent, unless such be the obvious intention of the parties.

And where the acts to be done on either side are concurrent, in declaring for a breach the plaintiff need not aver specific performance on his part; a general allegation that he was ready and willing to perform the agreement, and notice thereof to the defendant, is sufficient. (1 Saund. 320, b; 1 H. Bl. 273; 6 T. R. 570; 4 Bing. 409.)—*Kemble v. Mills*, 2 Scott's N. R. 121; 9 D. P. C. 446.

AMENDMENT.

1. (*Under 3 & 4 Will. 4, c. 42, s. 23.*) In replevin against the assignee of the reversion of part of the demised premises, if the defendant avow under the statute 11 Geo. 2, c. 19, s. 22, for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge at nisi prius may direct the avowry to be amended, either by converting it into an avowry at common law, or, leaving it as an avowry under the statute, by describing the rent in conformity with the proportionate value of the various parts into which the reversion has been divided. And *semble*, such amendments may be made, although first prayed for after the delivery of the verdict, and before it is recorded.—*Roberts v. Snell*, 1 M. & G. 577.
2. (*Under 3 & 4 Will. 4, c. 42, s. 23.*) Declaration in slander alleged, that the defendant had spoken these words of the plaintiff:—"S. has got himself into trouble; he is out on bail for 100*l.*, and is to be tried at the Old Bailey next Monday, for buying locks stolen from P. & Co. by one of their apprentices," &c. At the trial, the evidence was that the defendant said that "he had heard that S. had got into trouble," &c.: Held, that the record was amendable under the statute.—*Smith v. Knowelden*, 9 D. P. C. 402.
3. (*Same.*) Where a plaintiff has made too many persons defendants, the Court, before the trial, allowed the name of one of them to be struck out of the proceedings subsequent to the writ, on payment of costs, the remaining defendant being allowed to plead *de novo*.—*Palmer v. Beale*, 9 D. P. C. 529.
4. (*Under 3 & 4 Will. 4, c. 42, s. 23.*) The plaintiff declared on a guarantee by the defendant, and alleged that the defendant had requested him to lend one R. B. the sum of 24*l.* and that in consideration of the premises, and that the plaintiff would lend and advance to R. B. the further sum of 2*l.* per week, the defendant undertook to pay as well the said sum of 24*l.* as the said further sum of 2*l.* per week, "and such other sums as the plaintiff should so lend and advance to R. B." The guarantee proved was as follows:—"I beg you will continue to advance the sum of 2*l.* per week to R. B., and and I hereby engage to repay you all monies you may advance to him, in addition to the 24*l.* you have already let him have at my request." Held a variance, but amendable under the statute.—*Smith v. Brandram*, 9 D. P. C. 430.
5. (*Under 3 & 4 Will. 4, c. 42, s. 23.*) In slander, the declaration alleged that the defendant said of the plaintiff, "he is a thief, a swindler, and a forger," &c. &c. The proof was that the defendant spoke of the plaintiff words of the same meaning, but in the Welsh language: Held, that the declaration was amendable by the insertion of the Welsh words.—*Jenkins v. Phillips*, 9 C. & P. 766.
6. (*Same.*) An amendment under this statute cannot be made *after* verdict.—*Doe d. Bennett v. Long*, 9 C. & P. 773.
7. (*In misdemeanor.*) Indictment for perjury alleged to have been committed before commissioners to examine witnesses in a Chancery suit, stated that four commissioners (naming them) were commanded to examine the witnesses. On the commission being put in, it appeared that the commissioners, "or any three or two of them," were commanded to examine the witnesses: Held, a fatal variance; and the judge would not allow it to be amended under the stat. 9 Geo. 4, c. 15.—*Rag. v. Hewing*, 9 C. & P. 786.

And see PLEADING, 2.

ARBITRATION.

1. (*Award, when made in time.*) By an agreement of reference to arbitrators, with power to appoint an umpire, it was stipulated that the umpire should make his award within two calendar months *after* his appointment. He was appointed on the 29th June: and the time for making his award was afterwards enlarged by consent for three months. He made his award on the 29th November: Held, in time. (9 B. & C. 134, 603.)—*In re Higham and Jessop*, 9 D. P. C. 203.
2. (*Enlargement of time.*) Where the submission contains a power for the arbitrator to enlarge the time for making his award, but the time originally limited has expired without his doing so, the Court has still power, under the 3 & 4 Will. 4, c. 42, s. 39, to enlarge the time. (1 M. & W. 156; 4 D. P. C. 504; 7 D. P. C. 539; 4 M. & W. 24.)—*Newman v. Parbury*, 9 D. P. C. 288.
3. *Semble*, that on a reference to arbitration, the particulars of the plaintiff's demand are not necessarily brought before the arbitrator, and that if the defendant seeks to restrict the plaintiff's claim to the amount of the particulars, he should produce them.—*Kenrick v. Phillips*, 9 D. P. C. 308.
4. (*Conclusiveness of arbitrator's decision.*) On trespass, the defendant pleaded not guilty, and a justification. The cause was referred by order of nisi prius, and the arbitrator awarded, that "as the defendant had not proved his plea, the verdict for the plaintiff ought to stand:" and then stated several reasons for his opinion, which were not satisfactory: Held, that the adjudication was sufficient, and that the sufficiency of the reasons assigned by the arbitrator could not be taken into consideration.—*Archer v. Owen*, 9 D. P. C. 341.
5. (*Award, when final.*) Where an action on the case, and all matters in difference, being referred to an arbitrator, he awarded damages for an injury caused by the defendant to the plaintiff's property, by acts done on the adjacent property, and then (having the power to direct the mode of enjoying the property for the future) awarded that the parties should respectively enjoy the property as heretofore: Held, that the award was not final.—*Ross v. Clifton*, 9 D. P. C. 353.
6. (*Delegation of authority by one arbitrator to another.*) A cause and all matters in dispute were referred to the decision of two merchants and a barrister; the arbitrators met, and two of them agreed, on the merits, to find in favour of the plaintiff; but the lay arbitrators agreed to leave a point of law which had arisen, to the decision of the barrister. The latter decided that point in favour of the plaintiff, and executed the award at Birmingham, in accordance with his own opinions. On the next day, the award was executed in London by one of the lay arbitrators, also in favour of the plaintiff: Held, that the award was bad, as being a decision by one arbitrator, pursuant to a power delegated to him by the other arbitrators, they having no authority so to delegate.—*Little v. Newton*, 9 D. P. C. 437.
7. A clause in a partnership deed, authorizing a reference in case of disputes, and the making the award of the arbitrator, instead of the submission, a rule of Court, if it does not appear that the award was used by mistake for submission, is not within the meaning of the stat. 8 & 9 W. 3, c. 16, and a judge has therefore no power to order witnesses to attend an arbitrator acting in such a matter.—*In re Woodcroft*, 9 D. P. C. 538.
8. (*Costs.*) The Court will not, on disposing of a rule for setting aside an award, on the ground of the arbitrator having improperly proceeded *ex parte*, decide the

question whether the party against whom the award is made shall pay the costs arising from his delay; a separate motion must be made for that purpose.—*Gladwin v. Chilcote*, 9 D. P. C. 550.

ARSON.

Under an indictment on the stat. 7 & 8 G. 4, c. 30, s. 17, charging the prisoner with setting fire to a wood, he may be convicted on evidence showing that he set fire to a summer-house in the wood, from which the fire communicated to the wood.—*Reg. v. Price*, 9 C. & P. 729.

ASSAULT.

(*Operation of 1 Vict. c. 85, s. 11.*) A prisoner tried for manslaughter on the coroner's inquisition, may be convicted of an assault under the stat. 1 Vict. c. 85, s. 11.—*Regina v. Poole*, 9 C. & P. 728.

ASSUMPSIT.

(*Assumpsit or covenant, when maintainable—Pleading.*) The plaintiff declared in assumpsit on a parol agreement, to which the defendant pleaded non assumpsit. On the trial, it appeared that a draft had been prepared, containing matters intended by the parties to form the subject of a deed; that alterations were made in it by both parties, and that at length a deed was drawn up in accordance with the terms of the agreement, and executed. Held, first, that there was no subsisting parol agreement; and secondly, that the deed, being co-extensive with the supposed agreement, the plaintiff had concluded his action in assumpsit erroneously, and should have brought covenant. Held, also, that the defendant was entitled to set up the defence, that there was no parol agreement under the plea of non-assumpsit.—*Filmer v. Burnby*, 9 D. P. C. 466.

ATTORNEY.

1. (*Re-admission.*) Where an attorney had by mistake omitted to take out his annual certificate in due time, and a year had elapsed from the expiration of his last certificate, he having discovered, on the 16th November, immediately after its expiration, the omission which had been made, the Court allowed him, on the 19th, to be re-admitted without the usual notices, on payment of a fine of 20s., and of the arrears of duty.—*Ex parte Wybrow*, 9 D. P. C. 197.
2. (*Delivery of signed bill.*) Where business is done by an attorney for a person who afterwards, before action brought, becomes an attorney, the former need not deliver a signed bill before bringing an action against the latter. (2 H. Bl. 589.)—*Winsor v. Herbert*, 9 D. P. C. 237.
3. (*Discharging articles.*) Where a clerk was articulated to an attorney, who absconded during the continuance of the articles, the Court granted a rule to discharge the clerk from the articles, to be served at the attorney's last place of abode, and on his agent, if he had one, and stuck up in the office.—*Ex parte Wilkinson*, 9 D. P. C. 320.
4. (*Taxation of bill.*) Where an action is brought against an attorney, and he pleads a set-off for business done in equity only, the Court will not direct his bill to be taxed. (8 D. P. C. 414.)—*Slater v. Brookes*, 9 D. P. C. 349.
5. (*Discharging articles.*) Where a clerk is discharged from his articles, on the ground of his master's insanity, he must be articulated to another attorney for the residue of the term of five years which was unexpired at the time of the commencement of the insanity, and a portion of the time afterwards served with other

attorneys carrying on the master's business, cannot be reckoned.—*Ex parte Brown*, 9 D. P. C. 526.

And see BANKRUPTCY, 5; WARRANT OF ATTORNEY, 2.

BANKER. See LIEN.

BANKRUPTCY.

1. (*Warrant of attorney—Operation of 3 G. 4, c. 39.*) Trover is not maintainable by the assignees of a bankrupt against a creditor who sues out execution under a warrant of attorney not filed within twenty-one days, if the execution be completed before the act of bankruptcy: their remedy is by an action for money had and received, or by a special action on the stat. 3 G. 4, c. 39.—*Brook v. Mitchell*, 6 Bing. N. C. 349.
2. (*By procuring goods to be taken in execution—Operation of 2 & 3 Vict. c. 29.*) Where a trader commits an act of bankruptcy by procuring his goods to be taken into execution with intent to defeat or delay creditors, the execution, although levied *bonâ fide* by the judgment creditor, is not protected by the stat. 3 & 4 Vict. c. 29.—*Hall v. Wallace*, 7 M. & W. 353.
3. (*Pledge by bankrupt, when protected.*) The case of *Wright v. Fearnley*, 5 Bing. N. C. 89, was affirmed in error in the Exchequer Chamber.—*Fearnley v. Wright*, 6 Bing. N. C. 446; 1 Scott's N. R. 657.
4. (*Retrospective operation of 2 & 3 Vict. c. 29.*) The stat. 2 & 3 Vict. c. 29, does not apply retrospectively to cases in which the fiat was issued, and assignees were appointed, before it passed. (6 M. & W. 285, 684. See *Luckin v. Simpson*, 6 Bing. N. C. 353.)—*Moore v. Phillips*, 9 D. P. C. 294.
5. (*Bond under 1 & 2 Vict. c. 110, s. 8—Affidavit of notice of render.*) Where a bond is given pursuant to the 1 & 2 Vict. c. 110, s. 8, a render may be made before judgment; although a literal construction of the words of the condition would require a render afterwards.
An affidavit of the notice of render need not now be made pursuant to the rule of Court of T. T. 1 Ann.
After the render, if the plaintiff lodges a *ca. sa.* with the sheriffs against the defendant, it is irregular, and the Court will set it aside, and stay proceedings on the bond.—*Saunderson v. Parker*, 9 D. P. C. 495.
6. (*Same.*) Where a bond is given pursuant to that statute, the Court in which the action is brought has power to direct it, when satisfied, to be delivered up to be cancelled, although the plaintiff's attorney have a lien on it for costs; and it is not necessary to apply for that purpose to the Court of Bankruptcy.—*Wilson v. Firth*, 9 D. P. C. 573.

And see MONEY HAD AND RECEIVED.

BILLS AND NOTES.

1. (*Undertaking to indemnify against accommodation acceptance—Statute of limitations, when it begins to run.*) The defendant, when on the eve of departure to join the army of Don Pedro in Portugal, obtained from the plaintiff, an agent of Don Pedro, the loan of his acceptance for 40*l.*, payable forty days after date: Held, that these facts established an implied contract on the part of the defendant to indemnify the plaintiff against being called on to pay the bill at maturity.

Held also, that the statute of limitations began to run from the time of the

payment of the bill by the plaintiff, not from the time when it became due. (9 Ad. & E. 633.)—*Reynolds v. Doyle*, 2 Scott's N. R. 45.

2. (*Excuse for want of notice of dishonour.*) A declaration on a banker's cheque, which had been refused payment, by way of excuse for the want of notice to the drawers, alleged that the drawees had not, at the time the cheque was drawn, and from thence to the time of its presentment, any effects of the drawer in their hands, nor had the drawer sustained any damage by reason of his not having had notice of the non-payment. Held good on general demurrer. (1 T. R. 405; 2 T. R. 317; 3 Campb. 334; 7 East, 359.)—*Kemble v. Mills*, 2 Scott's N. R. 121; 9 D. P. C. 446.
3. (*Parol evidence to vary the contract by bill or note.*) In an action by the payee against the maker of a promissory note, although it is not competent to the defendant to controvert, or to vary by parol, the contract appearing on the face of the note, he may show that there was no consideration, or that the consideration has failed. (1 C. M. & R. 703; 1 M. & W. 212.)—*Abbot v. Hendricks*, 2 Scott's N. R. 183.
4. (*Debt, when maintainable on bill of exchange.*) Debt lies on a bill of exchange by an indorsee against his immediate indorser. (3 Price, 253; 2 Salk. 22.)—*Watkins v. Wake*, 9 D. P. C. 242.
5. (*Pleadings.*) Declaration by indorsee against acceptor of a bill alleged, that after the bill became due, the defendant promised to pay it "according to the tenor and effect of his said acceptance thereof." Held, that this was in effect a promise to pay on request, and therefore good on special demurrer.—*Christie v. Peart*, 9 D. P. C. 291.

And see PARTNERSHIP, 2.

BOND.

1. (*Indemnity against—Condition for notice to obligor, effect of—Pleading.*) Declaration stated, that in consideration that R. J., at the request of the defendant, would execute a bond to W. J. in the penal sum of 600*l.*, the defendant undertook to indemnify R. J., his executors &c., from any loss or damage by reason of his executing the bond; it then averred the execution of the bond by R. J., his death, and the grant of administration to the plaintiff, and alleged for breach, that an action having been brought on the bond against the plaintiff as administratrix, she was called upon, and forced and obliged to pay the sum secured by the bond, and a further sum for costs, &c. Plea, that the plaintiff was not called upon, or forced or obliged to pay, nor did she pay the said monies, nor was she damnedified modo et formâ: and issue thereon. At the trial, it appeared that the bond was subject to a condition for payment "at or before the expiration of six months' notice to pay the same." There was no evidence of such notice given to the obligor, but the defendant had notice of the action brought upon the bond. Held, that the plaintiff was entitled to recover. (3 T. R. 374.)—*Jones v. Williams*, 9 D. P. C. 252.
2. (*By collector of taxes, breach of condition of—Right of commissioners to sue upon.*)—The case of *Gwynne v. Burnell*, 2 Scott, 16, was affirmed on error in the House of Lords.—*Gwynne v. Burnell*, 6 Bing. N. C. 453; 1 Scott's N. R. 711.

And see BANKRUPTCY, 5; STAMP, 1.

CERTIORARI.

1. (*To remove order of justices—Notice to justices.*) The notice to justices required by the 13 Geo. 2, c. 18, s. 5, before removing their order by certiorari, should state the name of the party who intends to sue out the writ; and on motion for the certiorari, the Court must be satisfied on the affidavits that the party so named is the party by whom or on whose behalf the notice was given and the application is made.

The justices on whom the notice was served must be identified with the justices who made the order; and it is not enough that it is shown that an order of the same date, and to the effect described in the notice, was made by justices of the same name as those to whom the notice is given.—*Reg. v. Justices of Shrewsbury*, 9 D. P. C. 501.

2. (*To remove order of sessions.*) A rule called upon the prosecutor of a certiorari issued to remove an order of sessions, confirming, without appeal, an order of justices made pursuant to the statute 55 Geo. 3, c. 68, s. 2, for stopping up a footpath, to show cause why it should not be quashed, the recognizances required by the 5 Geo. 2, c. 19, s. 2, not having been entered into before the writ was issued, although they were entered into after the allowance: Held, that the statute applied only to cases where there was an appeal to the sessions, and not to cases where the order was confirmed without appeal; 2dly, that the application should have been to quash the allowance, not the writ itself; and the Court refused to mould the rule, so as to quash the allowance.—*Reg. v. Jones*, 9 D. P. C. 504.
3. (*To remove order of justices—Notice to justices.*) Notice of an intended application for a certiorari to remove an order of justices in sessions, made on the hearing of an appeal, stated the names of the appellant and respondent, and was signed by J. B., attorney for the respondents, and was served on those justices, who were sworn to have been present at the trial and hearing of the appeal: Held, a sufficient notice under the 13 Geo. 2, c. 18, s. 2.—*Reg. v. Justices of Wilts*, 9 D. P. C. 524.

And see AFFIDAVIT, 4; RAILWAY ACT, 1.

COINING.

- (*Indictment.*) An indictment for uttering counterfeit coin after a former conviction, charged that the prisoner did utter a counterfeit half-crown to E. H., "knowing the same to be false and counterfeit. Held, a sufficient allegation of the scienter, and that the word "knowing" must be taken to apply to the prisoner, and the scienter to the time of the uttering, although not stated to be "then and there."—*Reg. v. Page*, 9 C. & P. 756; *Reg. v. Jones*, *id.* 761.

COLLECTOR OF TAXES. See BOND, 2.

COMPUTATION OF TIME.

Under the 3 Geo. 4, c. 39, s. 1, which requires that every warrant of attorney to confess judgment shall be filed within twenty-one days after its execution, a warrant executed on the 9th day of the month may be filed on the 30th. (5 T. R. 383.)—*Williams v. Burgess*, 9 D. P. C. 544.

CONCEALMENT OF BIRTH.

On an indictment for child-murder, the mother of the child only can be convicted of a concealment of the birth.—*Reg. v. Wright*, 9 C. & P. 754.

CONSTABLE.

1. (*When protected by warrant.*) In trespass against a constable for taking the plaintiff into custody on a charge of felony, under a warrant which described him by a wrong christian name: Held, that the warrant afforded no protection to the defendant, although the plaintiff was the person really intended to be taken, and therefore that the plaintiff was entitled to recover, without having demanded a copy and perusal of the warrant, under the 24 Geo. 2, c. 44, s. 6. (1 B. & Ald. 647; 4 M. & Sel. 360; 1 Bing. 424; 2 C. M. & R. 196.)—*Hoye v. Bush*, 2 Scott's N. R. 86.
2. (*Powers of special constable.*) A special constable, duly appointed under the stat. 1 & 2 Will. 4, c. 41, is appointed for an indefinite time, and remains a constable until his services are determined or suspended under the 9th section of that statute; and being so appointed, he has all the authority of a constable at common law.—*Reg. v. Porter*, 9 C. & P. 778.
3. (*Double costs for.*) The statute 21 Jac. 1, c. 12, s. 5, applies to all constables, and therefore a constable appointed under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 76, is entitled, on discontinuance, to double costs under the statute of James.—*Maberly v. Pitterton*, 9 D. P. C. 234.

COSTS.

1. (*Patents Act—Certificate under 3 & 4 Vict. c. 24.*) An action on the case for the infringement of a patent, is within the operation of the 3 & 4 Vict. c. 24, s. 2; and notwithstanding the provisions of the stat. 5 & 6 Will. 4, c. 83, s. 3, the plaintiff, recovering only nominal damages, cannot have his full costs, or treble costs, without a certificate under the former act. And the Court held, that after the taxation, the judge had no power to grant such certificate.—*Gillett v. Green*, 7 M. & W. 347; 9 D. P. C. 219.
2. (*Security for.*) Where a party had assigned his property for the benefit of his creditors to trustees, and afterwards took the benefit of the Insolvent Act, and became bankrupt; in an action brought by the trustees in his name, the Court required security for costs to be given to the defendant; but they refused to allow him to plead a release, which the bankrupt was willing to give.—*Elliott v. Kendrick*, 9 D. P. C. 195.
3. (*Same—Mandamus.*) The Court will not compel a relater in a mandamus to give security for costs (he being interested in the matter in question), on the ground of his poverty, or that other persons have induced him to apply for the writ.—*Reg. v. Mayor, &c. of Malmesbury*, 9 D. P. C. 359.
4. In an action tried before the sheriff, to recover 2l. 8s. for goods sold, the plaintiff sought to prove his case by evidence of an admission made by the defendant at the time of the service of the writ of summons, that he owed "the defendant;" but it not appearing that the indorsement on the writ had been previously read over to him, the plaintiff had a verdict for 1s. only.—The Court refused to stay proceedings on payment of 1s., or to enter final judgment for the plaintiff, without costs.—*Batchelor v. Dudley*, 9 D. P. C. 384.
5. (*Suggestion for double costs.*) A suggestion is necessary only when there would otherwise be an inconsistency on the record; and therefore need not be entered in order to entitle a defendant to double costs, under the 21 Jac. 1, c. 12, s. 5. (1 Taunt. 210; 2 C. M. & R. 184; 1 M. & W. 205.)—*Maberly v. Pitterton*; 9 D. P. C. 234.

6. (*Taxation.*) Where the Master, on taxation, has allowed the charge for a witness, on the certificate of counsel that he was material and necessary, the Court will not review his decision.—*Marshall v. Parsons*, 9 D. P. C. 251.
7. (*On discontinuance after new trial granted.*) In an action on a bill of exchange, with a count on an account stated, the defendant had a verdict on the first count, and the plaintiff on the second. The defendant obtained a rule to set aside the verdict on the second count, and for a new trial. The Court allowed the plaintiff to discontinue without payment of costs. (4 M. & W. 502; 2 Scott, 540.)—*Earl of Macclesfield v. Baddeley*, 9 D. P. C. 312.
8. (*Operation of 3 & 4 Vict. c. 24.*) In an action of trespass, tried on the 27th June, 1840, the plaintiff had a verdict with 1s. damages, leave being reserved to the defendant to move to enter a nonsuit. The judge being applied to to certify under the 43 Eliz. c. 6, s. 2, declined to do so until the motion for a nonsuit should have been disposed of. On the 3d July following, the stat. 3 & 4 Vict. c. 24, came into operation. No motion for a nonsuit was made; and on the 9th November the judge certified. Held, that the certificate was null and void.—*Morgan v. Thorne*, 9 D. P. C. 226.
9. (*Same.*) Declaration in case, by the proprietor of certain medicines against a person for selling medicines prepared by the defendant, as and for and falsely representing them to be the medicines prepared by the plaintiff. Held, that the judge, on a verdict for less than 40s., might certify under the 3 & 4 Vict. c. 24, that the action was brought to try a right.—*Morison v. Salmon*, 9 D. P. C. 387.
10. (*Taxation—Costs of witnesses.*) In an action against the sheriff for neglecting to execute a writ, when the cause was called on for trial the plaintiff withdrew the record. On the taxation of costs of the day, the Master allowed the costs of two of the officers of the sheriff, to whom the writ had been directed, and who were in attendance to give evidence. The Court refused to order a review of taxation, on the ground that the witnesses were incompetent, since they might have been released at the trial.—*Curling v. Fitzgerald*, 9 D. P. C. 394.
11. (*Under 43 G. 3, c. 46, s. 3.*) Where a defendant was arrested, and without putting in special bail was discharged, under the 1 & 2 Vict. c. 110, s. 7, he was held not to be entitled to costs under the 46 G. 3, c. 46, s. 3. (2 D. P. C. 367.)—*Bennett v. Burton*, 9 D. P. C. 492.

And see ARBITRATION, 8; CONSTABLE, 3.

COURT OF REQUESTS.

A "dismissal" by the judge of the plaint of the plaintiff, after hearing witnesses on both sides, is equivalent to a final determination on the merits, and not merely to a nonsuit.—*Franks v. Wicks*, 9 D. P. C. 489.

COVENANT.

(*Construction of Covenant to repair.*)—A covenant "forthwith" to put premises into complete repair must receive a reasonable construction, and is not limited to any specific time; and therefore it is for the jury to say upon the evidence, whether the defendant has done what he reasonably ought in the performance of it.—*Doe d. Pittman v. Sutton*, 9 C. & P. 706.

And see ASSUMPSIT.

DEMURRAGE.

On a common count for demurrage, the plaintiff cannot (where there has been no special contract) recover for the detention of the ship for an unreasonable time

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loading and unloading, but must declare specially.—*Horn v. Benusan*, 9 C. & P. 709.

DEVISE.

1. (*Description of lands devised.*) A testatrix, who had a mansion and lands, situate in three adjoining parishes, K., B., and P., and a meadow in B., devised all her messuage and lands, "situate at K. aforesaid:" Held, that the land in B. and P. did not pass under these words, nor under a bequest of "all the residue of her estate and effects whatsoever and wheresoever."—*Pogson v. Thomas*, 6 Bing. N. C. 337.
2. (*Estate tail, what passes.*) A testator, by his will, devised as follows: "I give my house, gardens, &c. at G. to Mrs. S. S. and her heirs, if she has any child; if not, then after the decease of herself and her husband Mr. R. S., I give it to F. M. and her heirs." S. S. had a child who was living at the date of the will, but who died four days after the date of it, in the lifetime of the testator: Held, that S. S. took an estate tail; and that upon her death without heirs of her body, the property passed to F. M.—*Doe d. Jearrad v. Bannister*, 7 M. & W. 292.

DISORDERLY HOUSE.

By the stat. 39 G. 3, c. 79, certain places are declared to be disorderly within the meaning of the 36 G. 3, c. 8; and a penalty is annexed to certain offences committed in those places. Those offences are still punishable under the 39 G. 3, although the 36 G. 3 was passed for a limited period (three years) only.

The stat. 2 & 3 Vict. c. 12, which requires certain proceedings to be prosecuted in the name of the attorney and solicitor general, does not apply to offences against the 36 G. 3, c. 8, and 39 G. 3, c. 79.—*Ex parte Higginbotham*, 9 D. P. C. 200.

EJECTMENT.

1. (*Motion for judgment.*) In the C. P., where a term has been allowed to elapse between service of the declaration in ejectment and the motion for judgment, the rule for judgment is *nisi* only. (5 Scott, 618; 6 Scott, 433.)—*Secus* in Q. B. (2 D. P. C. 196; 3 D. P. C. 575.)—*Doe d. Musselwhite v. Roe*, 8 Scott, 471.
2. (*Service.*) Service of a declaration in ejectment on a servant of the tenant on the premises was held insufficient, although the deponent afterwards saw the tenant himself, and explained to him the nature of it, there being no admission by the tenant that it had come to his hands.—*Doe d. Ginger v. Roe*, 9 D. P. C. 336.
3. (*Title of declaration.*) A declaration in ejectment was intitled "Hilary Term, 4 Vict.;" but the notice at the foot, which was dated 7th January, 1841, required the tenant to appear in the next term. Held sufficient.—*Doe d. Brook v. Roe*, 9 D. P. C. 347.
4. (*Declaration—Service.*) In the body of a declaration in ejectment, the name of the tenant in possession was inserted, instead of "Richard Roe;" but the notice was signed "Richard Roe." Held no objection.—*Doe d. Dickenson v. Roe*, 9 D. P. C. 363.
5. (*Service.*) Where the party interested in the premises has become bankrupt, service on his assignees, and on the messenger in possession under the fiat, is sufficient to obtain a rule for judgment.—*Doe d. Chadwick v. Roe*, 9 D. P. C. 492.
6. (*Proceedings under 4 G. 2, c. 28.*) On an application for judgment against the casual ejector, where the proceedings are under the 4 G. 2, c. 28, it is not enough to show that there is no sufficient distress to countervail the arrears of rent, where

more than half a year's rent is sworn to be due.—*Doe d. Powell v. Roe*, 9 D. P. C. 546.

7. (*New trial—Costs.*) Where the lessor of the plaintiff has been nonsuited in default of the defendant's appearance, the defendant may have a new trial on the merits of payment of costs, as between party and party, not as between attorney and client.—*Doe d. Cocking v. Appleby*, 9 D. P. C. 556.

EVICTIION. See PLEADING.

EVIDENCE.

1. (*Admissibility of parol evidence to control deed.*) Where land in the possession of a tenant for years is conveyed by deed, the right of the purchaser, as assignee of the reversion, to receive the whole rent for the current quarter, cannot be controlled by a contemporaneous parol agreement to apportion the quarter's rent between the assignor and assignee.—*Flinn v. Calow*, 1 M. & G. 589.
2. (*Declarations by defendant dehors written contract—Ratification of agent's authority.*) In an action on the case for false representations on the sale of a ship, whereby she was classed lower in Lloyd's books than she would if she had been built of the materials described: Held, that although the sale took place under a written contract, minutely setting forth the build and dimensions of the vessel, (but omitting all mention of the materials), the plaintiff was at liberty to give in evidence verbal statements and declarations made by the defendant touching the ship, pending the negotiation for the purchase, and before the written contract was entered into, amounting to a warranty that her frame was of a particular description of timber.

Such representations having been made by an agent without any express authority from the defendant, it was held that the judge was warranted in leaving it to the jury to infer from the subsequent conduct of the defendant—e. g. from his not having repudiated the warranty when apprised of it—that he was privy or impliedly assented to the misrepresentations of the agent.—*Wright v. Crookes*, 1 Scott's N. R. 685.

3. (*Production of written contract.*) Where a plaintiff closes his case without its appearing that there is a contract in writing relating to the subject-matter of the action, the defendant, if he means to rely upon it, must produce it in a shape to be admissible in evidence, even though the plaintiff had notice to produce it. (8 Taunt. 327.)—*Magnay v. Knight*, 2 Scott's N. R. 64.
4. (*Notice to produce.*) In a town cause, a notice to produce a copy of the writ of summons was served at eight p. m. on the evening before the trial, at the office of the defendant's attorney, on a clerk who had the management of the cause: Held in time.—*Gibbons v. Powell*, 9 C. & P. 634.

EXECUTOR AND ADMINISTRATOR. See TROVER.

FINES AND RECOVERIES ACT.

- (*Certificate of acknowledgment by married woman abroad.*) On an application to file the certificate of acknowledgment of a married woman, taken at St. Petersburg, the affidavit verifying the certificate was sworn before the British consul in Russia, but it appeared that the local magistrates there were not empowered to take affidavits. The Court allowed the certificate to pass.—*In re Daly*, 9 D. P. C. 380.

And see HUSBAND AND WIFE.

FRIENDLY SOCIETY.

By one of the rules of a benefit society, it was provided, that the committee should meet whenever summoned by the secretary, for the purpose of examining candidates for admission, and to settle and determine any matter relating to the breach or nonobservance of the articles of the society by members, and their exclusion in consequence thereof, and to settle and determine *any other matter or thing relating to the society*, subject nevertheless to the confirmation of the society at their next quarterly meeting. By other rules, provision was made for a graduated scale of allowances to sick members, according to the state of the funds and the period for which the member continued a charge upon it, and for sums to be paid on the death of a member or his wife; and persons receiving the sick-allowance were prohibited from working. The plaintiff, a member of the society, had been for some time in receipt of the sick-allowance, in consequence of an accident that was likely to disable him permanently from the use of his trade, when the committee, in November 1824, with his assent, came to the following resolution:—"That J. T. (the plaintiff) be allowed 7s. a week for life, with permission to attend to any business he may be able to transact, on consideration of his giving up all further claim on the society during his life (including his wife's death money), and relinquishing all claims on the society at his own decease." This resolution was signed by W. as secretary, and by R., a member of the committee, and was confirmed at the next quarterly meeting of the society, and the 7s. a week was paid regularly to the plaintiff down to June 1838, when it was discontinued. Held, that the resolution was not one which the committee had authority by the rules of the society to make, and therefore that it was not binding on the society; and that W. and R. were not personally liable to the plaintiff by reason of their having signed it.—*Tyrrell v. Woolley*, 2 Scott's N. R. 171.

HABEAS CORPUS.

1. Where a party seeks to be discharged out of custody on the ground of an illegality in the warrant of commitment, he must be brought before the Court by habeas corpus: the validity of the warrant cannot be discussed in his absence, although it be sworn that he is so poor as to be unable to bear the expense of being brought up.—*Exp. Martins*, 9 D. P. C. 194.
2. A proceeding under the Smuggling Act, 4 & 5 Will. 4, c. 13, is a "criminal matter," and therefore a writ of habeas corpus to bring up a defendant committed under that act should issue from the *Crown* side of the Court of Queen's Bench. If however it be issued from the *Plea* side, that is an irregularity only, which is waived by the solicitor for the customs appearing before a judge to oppose the defendant's discharge, and not taking that objection before an order for the discharge is made.—*In re Eaton*, 9 D. P. C. 207.

HIGHWAY.

(*Demand of highway rate—Competency of rated inhabitants.*) A demand of a highway rate, made by one only of two surveyors, is sufficient.

An inhabitant of the parish for which the rate is made is a competent witness in support of the rate, by virtue of the stat. 54 Geo. 3, c. 170, s. 9.—*Morrell v. Martin*, 6 Bing. N. C. 373.

INDICTMENT. See COINING; POACHING.

INFANT. See PROCHAIN AMY.

INHERITANCE. See SCOTCH MARRIAGE.

INSURANCE.

(*Insurable interest—Bounty.*) A French law provides that "the vessel which shall have fished, either in the Pacific by doubling Cape Horn, or by passing through the Straits of Magellan, or to the south of Cape Horn, at sixty-two degrees of latitude at the least, shall obtain on its return a supplemental bounty, if it brings back in the produce of its fishery one-half at least of its burthen, or if it can prove a navigation of sixteen months at the least." Held, first, that a vessel which had caught fish to the amount of half its burthen in the Atlantic, then doubled Cape Horn and fished without success, and was lost within sixteen months after setting sail, had not complied with the conditions of the law, so as to be entitled to the bounty: and secondly, that the practice of the French government to allow the bounty under such circumstances was a mere matter of expectation, and did not constitute a vested interest which could be the subject of insurance. (2 N. R. 321; 11 East, 434.)—*Devaux v. Steele*, 6 Bing. N. C. 358.

INTERPLEADER ACT.

1. Actions were commenced by two persons, each claiming to be the lawful holder of a bill of exchange, against the acceptor. The Court directed an issue to try who was lawfully entitled to recover on the bill, and relieved the acceptor from all claim in respect of costs.—*Regan v. Serle*, 9 D. P. C. 193.
2. A sheriff, having levied on the goods of the defendant, received notice of his bankruptcy, and of a claim by the provisional assignee "or of any other persons who might be appointed assignees." After the appointment of assignees, the sheriff obtained an interpleader rule, calling upon the provisional assignee only to appear: Held, that the assignees were entitled to appear on this rule. (2 D. P. C. 55.)—*Ibbotson v. Chandler*, 9 D. P. C. 250.
3. (*Costs.*) Where an application was made to a judge at chambers under the act, and the parties, at the instance of the execution creditor, did not go before the judge, and the creditor, after inquiry, abandoned his execution; the Court refused, on motion, to grant to the claimant the costs of his attendance at chambers, and left him to his action.—*Swaing v. Spencer*, 9 D. P. C. 347.

JOINT STOCK BANKING COMPANY.

1. (*Execution against.*) In an action against the public officers of a joint stock company, execution under statute 7 G. 4, c. 46, against a partner not named on the record, can be obtained only upon a scire facias.—*Whittenbury v. Law*, 6 Bing. N. C. 345.
2. The case of *Booth v. The Bank of England, Myl. & Cr.*, was affirmed in the House of Lords.—*Booth v. Bank of England*, 6 Bing. N. C. 415; 1 Scott's N. R. 701.
3. (*Action by manager—Pleadings.*) In an action by a banking copartnership, suing under the 7 G. 4, c. 46, the declaration commenced, "W. C., manager of a certain joint stock society, &c. who has been duly named and appointed the nominal plaintiff on behalf of the said copartnership, under a certain act of parliament," &c. &c.: Held sufficient, without alleging that the company was established, or that the plaintiff was named manager, in pursuance of the act, (6 M. & W. 570.)—*Christie v. Peart*, 9 D. P. C. 291.

LANDLORD AND TENANT.

(*Right of tenant to remove trade erections.*) The plaintiff demised to the defendant

certain salt springs; the defendant was to erect salt works on the premises, and to pay a rent in proportion to the number of works erected, and he covenanted to leave the works in good repair at the end of the term. Held, that iron salt-pans, resting by their weight on a frame of brick, used in the boiling of salt, were parcel of such works, and that the defendant was not entitled to remove them at the end of the term.—*Earl of Mansfield v. Blackburne*, 6 Bing. N. C. 426.

And see COVENANT; PLEADING, 6.

LARCENY.

1. (*What sufficient taking.*) A. was treating B. at a public house, and put down a sovereign, desiring the landlady to give him change: she could not do so, and B. said he would go out and get change. A. said, "You will not come back with the change." B. replied, "Never fear." A. allowed B. to take up the sovereign, and B. never returned either with it or the change: Held, no larceny, as A., having permitted the sovereign to be taken away for the purpose of being changed, could never have expected to receive back the specific coin, and had therefore divested himself of the entire possession of it.—*Reg. v. Thomas*, 9 C. & P. 741.
2. (*Animus furandi.*) A landlord went to his tenant, who had removed all his goods, to demand rent amounting to 12*l.* 10*s.*, taking with him a receipt ready written and signed. The tenant paid to him 2*l.*, and asked to look at the receipt, which was given to him; he refused to return it, or to pay the remainder of the rent. The landlord swore that he never intended finally to part with the receipt unless on payment of all the rent: Held, a larceny, if the jury were of opinion that the tenant intended by fraud to obtain possession of the receipt; and that the fact of the part payment of the rent made no difference.—*Reg. v. Rodway*, 9 C. & P. 784.

LEGITIMACY. See SCOTCH MARRIAGE.

LIBEL.

(*Evidence of subsequent publication of the same libel.*) In an action for a libel published in a newspaper, the plaintiff was allowed to give in evidence a repetition of the libellous matter in a paper published after the commencement of the action, for the purpose of showing the animus: and in leaving the case to the jury, the judge told them to look at the two paragraphs, and to give the plaintiff such damages as they should think him entitled to under the circumstances: Held, that the direction was right.—*Borwell v. Adkins*, 2 Scott's N. R. 11.

LIEN.

(*By bankers.*) B. bought, on account of the plaintiff, and with his money, certain exchequer bills, which he deposited in a box that he kept at his bankers, himself retaining the key. Whenever it became necessary to receive the interest on the bills, and to renew them, B. was in the habit of taking them out of the box, and giving them to the bankers for that purpose, and the new bills were afterwards handed over to B. and locked up by him in the box, the interest received being passed to the credit of his account. The bills themselves were never entered to his account. Held, that the bankers had not, as against the plaintiff, a lien on the bills for advances made by them to B. while the bills remained in their hands in the manner before mentioned.—*Brandao v. Barnett*, 2 Scott's N. R. 96.

LIMITATION ACT.

(*Determination of tenancy at will—Construction of 3 & 4 W. 4, c. 27, s. 7.*) Where A., in 1817, let B. into possession of lands as tenant at will; and in 1827, A.

entered upon the land without B.'s consent, and cut and carried away stone therefrom : Held, that this entry amounted to a determination of the estate at will ; and that B. thenceforth became tenant at sufferance, until, by agreement express or implied, a new tenancy was created between the parties : and therefore, that unless the fact of such new tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as, by the stat 3 & 4 Will. 4, c. 27, s. 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, i. e. in the year 1818.—*Doe d. Bennett v. Turner*, 7 M. & W. 226.

MANDAMUS.

In a case in which, by agreement between the parties, an application was made for a mandamus, merely with a view to obtain the opinion of the Court, whether on the construction of a private act of parliament, the proceeding by mandamus was a proper one, the Court stopped the argument, and refused to give any decision.—*Reg. v. Directors of the Blackwall Railway*, 9 D. P. C. 558.

And see *COSTS*, 3.

MANSLAUGHTER. See *ASSAULT*.

MASTER AND SERVANT.

A van was standing at A.'s door, from which his goods were being unloaded, and his gig was standing behind. B.'s carriage came up, and there not being room to pass, B.'s coachman got down, and laid hold of the van-horse's head ; this caused the van to move, and thereby a packing case fell out of the van on the shafts of the gig, and broke them : Held, that B. was not liable for this injury, as the coachman was not acting in his employ at the time.—*Lamb v. Palk*, 9 C. & P. 629.

MONEY HAD AND RECEIVED.

(*Solvent and bankrupt partners.*) A. entered into partnership with B. and C., who had previously carried on the same trade together, and who shortly afterwards became bankrupt : and by an agreement, to which A. and the assignees of B. and C. were parties, it was agreed, that A. should realize the assets and liquidate the debts of the firm ; and that the official assignee of the bankrupts should be empowered by A. to collect the outstanding debts, and pay the amount to S. & Co., bankers, to the account of A., being allowed the usual per centage : Held, that A. could not alone sue the official assignee, in an action of money had and received, for monies collected by him under this agreement, which remained in his hands, and of which he had rendered an account to A.—*Lewis v. Edwards*, 7 M. & W. 300.

NAVIGATION ACT.

The Navigation Act, 3 & 4 Will. 4, c. 54, does not prohibit the importation for home consumption (except in British vessels, &c.), of any goods the produce of Europe, excepting these specifically enumerated in the second section.—*Thompson v. Irving*, 7 M. & W. 867.

NEW TRIAL.

(*Where the verdict is under 20l.*) Where a verdict is for less than 20l., unless practice or fraud on the part of the plaintiff be shown, the Court will not grant a new trial on the ground of surprise.—*Bransdon v. Didsbury*, 9 D. P. C. 199.

NOTICE TO QUIT.

(*Service of.*) A notice to quit, served on the tenant's wife at his house, with a

statement that the paper delivered is "a notice of discharge," is sufficient.—*Smith v. Clark*, 9 D. P. C. 202.

ORDER OF JUSTICES. See CERTIORARI.

ORDER OF REMOVAL.

(*Notice of appeal.*) A notice of appeal described the order of removal as made by R. C. and another magistrate, instead of B. C., there being two magistrates in the county whose respective Christian names commenced with those initials. The sessions having refused to hear the appeal on the ground of the variance, the Court granted a mandamus to compel the hearing of the appeal.—*Reg. v. Justices of Denbighshire*, 9 D. P. C. 509.

PARTICULARS OF DEMAND.

(*How far conclusive on the plaintiff.*) A plaintiff by mistake inserted in the particulars of demand, as among the payments for which he gave credit, the price of an article which in fact had not been paid for, but returned: Held, that it was rightly left to the jury to say whether in fact the balance of the whole account was or was not in the plaintiff's favour.—*Lamb v. Michlethwaite*, 9 D. P. C. 531.

And see ARBITRATION, 3.

PARTNERSHIP.

1. (*Liability of dormant partner.*) The judgment of the Court of Common Pleas in *Beckham v. Knight*, 4 Bing. N. C. 243; 5 Scott, 619, was affirmed on error in the Exchequer Chamber.—*Beckham v. Knight*, 1 M. & G. 738; 1 Scott's N. R. 675.

2. (*Liability of partners on bills.*) To a count in assumpsit on a bill of exchange against three partners, one of them pleaded that the bill was accepted by the other two in the name of the firm, without his knowledge or consent, for a debt due from them before he became a member of the firm: Held, that this plea was not sustained by evidence that the bill was accepted in discharge of a debt which arose partly before and partly after that partner joined the firm.—*Wilson v. Lewis*, 2 Scott's N. R. 115.

And see MONEY HAD AND RECEIVED.

PATENTS' ACT. See COSTS, 1.

PAVING AND LIGHTING ACT. See PLEADING, 5.

PLEADING.

1. (*In trover—Lien.*) In trover, a lien may be given in evidence under a plea that the plaintiff was not lawfully possessed. (4 Bing. N. C. 54; 5 M. & W. 139.)—*Brandao v. Barnett*, 2 Scott's N. R. 96.

But not under not guilty.—*White v. Teale*, 4 P. & D. 43.

2. (*Statement of agreement containing independent stipulations—Amendment.*) In assumpsit on an agreement containing various stipulations on either side, not dependent on each other, the omission to set out the whole of them in the declaration is no ground of nonsuit. But the variance, if any, is amendable at the trial, under the 3 & 4 Will. 4, c. 42, s. 23.—*Clark v. Morrell*, 2 Scott's N. R. 17; 9 D. P. C. 461.

3. (*Declaration in action on the case—Allegation of negligence, when sufficient.*) In case against a railway company for an injury to the plaintiff's house in consequence of another house falling against it, the declaration alleged as a breach, that the defendants did not use due care or skill, or take due, reasonable, or pro-

per precautions in or about making the railway and excavations, and that they so carelessly, negligently, unskillfully, and improperly proceeded in the making of the said railway and excavations, without taking due and proper care and precautions to prevent the said house, so being near to the house of the plaintiff, from falling upon and against the said house of the plaintiff, that by reason of the careless, negligent, unskillful, and improper conduct of the company, and for want of due and proper precautions by them, the said house so near to the house of the plaintiff gave way, and fell upon and against the house of the plaintiff: Held sufficient.—*Davis v. London and Blackwall Railway Company*, 2 Scott's N. R. 74.

4. (*Conclusion to the country.*) By the conditions of the sale by auction of certain reversionary interests, it was stipulated that the vendors should within twenty days after the sale deliver an abstract of title, and that all objections which should not be taken in writing within ten days afterwards should be considered as waived. In an action by the purchaser, the breach alleged in the declaration was, that the vendors did not within twenty days after the sale deliver an abstract of title. The defendants pleaded that they did within twenty days after the sale deliver an abstract, but that the plaintiff did not, within ten days after the delivery of the abstract take any objections to the title in writing, according to the conditions. The plaintiff replied, that although true it was that the defendants did within twenty days after the sale deliver an abstract, yet they did not upon such abstract disclose and show to the defendants a good title, and that the plaintiff did within ten days after the delivery of the abstract, take objections to the title in writing, according to the conditions; concluding to the country: Held, that the replication did not introduce any new matter, and therefore properly concluded to the country.—*Smith v. Tanner*, 2 Scott's N. R. 77.

5. (*Traverse of matter of law—Liability on bond for collection of rates under paving and lighting act.*) Debt on bond by the treasurer appointed by commissioners acting under a local Lighting and Paving Act, against a collector of rates and his sureties. The defendants cravedoyer of the bond and condition, which recited, *inter alia*, that H. J., one of the defendants, had been appointed collector of the rates due and payable under and by virtue of the act, and had been called upon to give security for the due performance of the office; and the condition was, *inter alia*, for the collection of all such rates as H. J. should be directed to demand and obtain by virtue of his said office, and for delivering a true account of and paying to the treasurer of the commissioners, all monies by him received "by virtue and for the purposes of the said act." The defendants then pleaded, so far as related to that part of the condition, that "during the continuance of the said appointment no rate was made or in any way existed which he, the said H. J., could legally or according to law collect or get in, or could legally or according to law demand or obtain by virtue of his said office, and that he did not, at any time during the continuance of his said appointment, legally receive any money by virtue or for the purposes of the said act, or relative to the collectorship of the said rates:" Held, first, that the plea would have been bad on special demurrer, if the objection had been sufficiently pointed out, for attempting to raise an issue of law, and for not showing positively, either that no rate was made, or in what the alleged illegality consisted.

Secondly, that the first part of the plea, which stated "that no rate was made or in any way existed which he, the said H. J., could legally or according to law collect or get in," &c. not being specially demurred to, was a substantial defence

to the action, as showing a sufficient excuse for non-performance of the condition, and that the rest of the plea might be rejected as surplusage.—*Webb v. James*, 7 M. & W. 279; 9 D. P. C. 314.

6. (*Several counts founded on same contract—Landlord and tenant.*) The first count of a declaration was framed upon an agreement whereby the plaintiff agreed to let, and the defendant agreed to take, certain premises, subject to conditions therein specified, and whereby it was agreed that the defendant should keep the windows, and all other parts of the premises, except the roof and main timbers, and the outside, in effectual repair: and alleged as a breach, that he permitted them to be out of repair. The second count stated, that in consideration that the defendant had become and was tenant to the plaintiff of a certain other messuage and premises, the defendant promised to use them in a tenant-like and proper manner; and alleged as a breach, that he did not use the said last-mentioned premises in a tenant-like and proper manner, but made holes in the wall, damaged the doors, &c. At the trial, one contract of demise only, applying to one house only, was proved: Held, that the plaintiff could not recover damages in respect of the breaches alleged in both counts, inasmuch as they must be taken to have reference to different messuages.—*Holford v. Dunnett*, 7 M. & W. 348.
7. (*Argumentative traverse of allegation of title.*) Declaration in assumpsit stated, that the plaintiff put up certain leasehold premises to auction, subject to conditions that the purchaser should complete the purchase by a certain day, and that the plaintiff should deduce a good title to the premises, commencing with the lease under which they were then held: and assigned as a breach, that, although the plaintiff did deduce a good title commencing with the lease, the defendant did not complete the purchase according to the contract.

The defendant pleaded, that the premises were, on &c., demise by T. L. to W. B. for a term still subsisting, subject to a covenant by W. B. to keep the premises in repair, and for re-entry by T. L. in default thereof: that the interest of W. B. vested by assignment in the plaintiff, and that the plaintiff, after the assignment, suffered the premises to be out of repair, and that they continued so up to the time of sale, so that the term might, at the option of T. L., be determined; and that the plaintiff, by reason of the premises, had not, at the time of the sale or afterwards, any valid title to the premises. The defendant pleaded also, that the plaintiff had not, at the time of the sale or at any time afterwards, any good and valid title to the premises, and did not deduce or make a good title to the defendant.

On special demurrer to these pleas, the former was held bad, as being an argumentative denial of the allegation in the declaration, that the plaintiff made a good title; and that the latter, on the ground that, if the defendant meant to object to the validity of the lease, he ought to have confessed the allegation of title in the declaration as it stood, and then to have pointed the plea specifically to the objection that the lessor had no title.—*Wheeler v. Wright*, 7 M. & W. 359.

8. (*Replication de injuriâ.*) Action by indorsee against acceptor of a bill of exchange. Pleas: 1st, That the drawer lent to the defendant certain sums of money for the purpose of gaming, and for securing payment of the same, the defendant accepted certain bills of exchange, in lieu of which the bill in question was given, and that the plaintiff had notice of the premises; 2d, A similar plea, but alleging that the drawer and certain persons to the defendant unknown, won money of him by gaming: Held, that the replication de injuriâ to these pleas was good. (1 M. & W. 65.)—*Humphreys v. O'Connell*, 9 D. P. C. 213.

9. (*Declaration for goods sold—F frivolous demurrer.*) A count in debt stated, that the defendant was indebted to the plaintiff "for goods sold and delivered to the defendant by the plaintiff at his request." The Court set aside as frivolous a special demurrer to this declaration, on the ground of ambiguity. (2 C., M. & R. 692.)—*Deleware v. Percer*, 9 D. P. C. 244.
10. (*Quæ est eadem—New assignment.*) A count in assumpsit stated, that the plaintiff made his bill of exchange, which the defendant accepted, and that before it became due the plaintiff had parted with the possession thereof; and thereupon, in consideration that the plaintiff would again procure possession of the bill, and prevent it from being presented for payment, the defendant would remit the amount (728l. 6s.) on a certain day. The count then averred performance by the plaintiff, and breach by the defendant, except as to 118l. 16s. Plea, as to 609l. 10s., parcel of the sum of money in the declaration mentioned, that the defendant paid to the plaintiff 700l. in satisfaction of the sum of 609l. 10s., parcel of the monies specified in a bill of exchange, dated &c., which is the same identical bill as that in the declaration mentioned. Replication, that the bill mentioned in the plea is not the same identical bill, &c., concluding to the country: Held, bad on special demurrer. (1 Ad. & E. 210.)—*Wheeler v. Senior*, 9 D. P. C. 270.
11. (*Issuable plea, what is.*) A plea to a count by indorsee against acceptor of a bill of exchange, that the drawer had been twice a bankrupt, and that his estate had not produced 15s. in the pound under the second fiat, whereby the property in the bill vested in his assignees, is an issuable plea. (8 D. P. C. 760.)—*Mackay v. Wood*, 9 D. P. C. 278.
12. (*Effect of lib. ten.*) The plea of liberum tenementum admits the possession of the plaintiff, and renders it incumbent on the defendant to prove title, either by deed or by twenty years' actual possession.—*Grice v. Lever*, 9 D. P. C. 246.
13. (*Traverse of immaterial allegation.*) To covenant for rent against the lessee of tolls, the defendant pleaded, that before the rent became due, the plaintiff entered upon the tolls, and then ejected, expelled, put out, and removed the defendant from the possession thereof. Replication, that the plaintiff did not enter into or upon the tolls, or eject &c. the defendant from the possession thereof: Held (in the Court of Exchequer), that the replication was bad on special demurrer, for traversing both the entry and the expulsion. (Ld. Raym. 369; Willes, 129; 1 Bing. N. C. 502.)—*Palmer v. Gordon*, 9 D. P. C. 248. [This decision has been reversed on error in the Exchequer Chamber.]
14. (*In covenant—Discharge of agreement under seal by parol.*) The plaintiff declared against the defendant as administratrix, upon a covenant under seal, entered into by the testator. The defendant pleaded that the testator had died insolvent, and then alleged a parol agreement with the plaintiff, upon the faith of which she was induced to take out letters of administration to assign the deed to the plaintiff, the promise being that the plaintiff would not seek to charge her as administratrix. The plaintiff replied, taking issue on the promise alleged in the plea: Held, that the plea was bad, as seeking to answer an agreement under seal by a parol promise, and that the plaintiff was entitled to judgment non obstante veredicto, the verdict having been entered for the defendant, on the ground that the plea was not to be taken as alleging a deed under seal, but was proved by evidence of a parol agreement, and that such proof being given, the defendant was entitled to a verdict.—*Harris v. Goodwin*, 9 D. P. C. 409.

15. (*Several pleas.*) The 4 & 5 Ann. c. 16, does not bind the crown. The Court, therefore, have no power to compel the Attorney-General, in an information for intrusion, to allow the defendant to plead several matters.—*Attorney-General v. Donaldson*, 9 D. P. C. 319.

16. (*Frivolous demurrer.*) Assumpsit for goods sold and delivered. Plea, that the goods were, with the knowledge and consent of the plaintiffs, sold to the defendant, being the agent of the plaintiffs, in his own name, as the true owners, &c. Replication, that the goods were not, with the knowledge and consent of the plaintiffs, sold to the defendant by H., in his own name, as the true owner, in manner and form, &c. Special demurrer, on the ground that the traverse was a negative pregnant and ambiguous. The Court set aside the demurrer as frivolous.—*Pigeon v. Osborne*, 9 D. P. C. 511.

17. (*Replication de injuriâ.*) De injuriâ may be replied in an action of debt on simple contract, subject to the rules and exceptions which govern its admissibility in actions of tort.

In debt for goods sold and delivered, the defendant pleaded that the plaintiff sold and delivered the goods by M., his agent; that M., as such agent, and with the plaintiff's consent, sold the goods in his own name, as the true owner; that the defendant did not know, and had not the means of knowing, the plaintiff to be the true owner, and bought and received the goods as the proper goods of M.; that at the time of the sale M. was and still is indebted to the defendant in a sum exceeding the debt and damages, out of which the defendant is willing to set-off, &c. Replication, de injuriâ: Held, on demurrer, that the plea was good as a plea in excuse, and that de injuriâ might be replied to it. (7 T. R. 359; 4 B. & C. 547.)—*Purchell v. Salter*, 9 D. P. C. 517.

18. (*Immaterial issue.*) A. guaranteed to B. the payment of a sum of money advanced on certain shares in a company, "in case the shares should not make up the sum due." In an action on the guarantee, the declaration alleged that the shares were of no value. The defendant, by his plea, traversed that allegation: Held, that a judge at chambers was right in striking out the plea, as tendering an immaterial issue.—*Murray v. Boucher*, 9 D. P. C. 537.

19. (*Replication to plea of payment into Court.*) To an indebitatus count in debt for goods sold, the defendant pleaded payment into Court, and that he never was indebted to a greater amount. Replication, that the defendant was indebted to a greater amount: Held, on demurrer, that the replication was bad, for not stating that the defendant was and is indebted, according to the form given by the rule of T. T. 1 Vict.—*Faithful v. Achley*, 9 D. P. C. 555.

20. (*Evidence under non assumpsit, in action on special contract.*) Where the plaintiff declared specially in assumpsit, that in consideration that the plaintiff had sold and delivered twenty tons of best Dutch lead to the defendant, the defendant promised to deliver to the plaintiff prussiate of potash to the same amount, and the plaintiff averred the delivery to the defendant of the twenty tons of best Dutch lead, and alleged as a breach, that the defendant would not deliver the full quantity of potash, to which declaration the defendant pleaded non assumpsit: Held, that upon that issue the defendant could not go into evidence to show that the lead was of inferior quality.—*Pegg v. Stead*, 9 C. & P. 636.

And see AGREEMENT; ASSUMPSIT; BILLS AND NOTES, 4, 5; JOINT STOCK BANKING COMPANY; PRACTICE, 1, 2; RAILWAY ACT, 2; REPLEVIN; USURY.

POACHING.

(*Indictment for assaulting gamekeepers.*) An indictment for assaulting a gamekeeper with an offensive weapon, under the stat. 9 Geo. 4, c. 69, s. 2, after stating that the defendants were by night in certain land of J. R., armed with guns, for the purpose of destroying game, alleged that they were "then and there in the said land by night as aforesaid, by one W. R., the steward of the said J. R., then and there having lawful authority to seize and apprehend them, found," and proceeded to state that the defendants assaulted and offered violence with the guns to J. R.: Held, that this indictment was bad in arrest of judgment, as not sufficiently showing that the defendants, when found by W. R. were committing an offence against the statute.—*Reg. v. Curnock*, 9 C. & P. 730.

PRACTICE.

1. (*Adding pleas.*) The commissioners of sewers, having obstructed a water-course which the plaintiff claimed a right to navigate, made him an offer of compensation, which he refused, and sued for more. The defendants by their pleas denied the plaintiff's right, and also the obstruction. After abortive attempts during four years to proceed with a defence of the action, the Court refused to allow the defendants to add a plea under the Statute of Sewers, 23 Hen. 8, c. 5, (which would defeat the action) unless they renewed, and the plaintiff refused, the offer of compensation originally made.—*Medley v. Pritchard*, 6 Bing. N. C. 443.
2. (*Rule to plead several matters—Not guilty "by statute."*) In an action against the collector of customs for the port of London, for an act done by him in the execution of his duty, a judge at chambers, on application for leave to plead certain special matters in addition to the plea of not guilty given him by statute, made an order, subject to a condition that the defendant should strike out the words "by statute" in the margin of the first plea. The Court refused to expunge the conditional words. (1 C., M. & R. 61.)—*Legge v. Boyd*, 2 Scott, N. R. 1.
3. (*Rule for special jury.*) Where, after notice of trial, a defendant obtained a rule for a special jury, it is not sufficient that he complies with the requisitions of the rule of Hil. term, 1 Vict.; he is bound to use due diligence to obtain the attendance of a special jury by the day appointed for the trial of the cause. (2 B. & Ald. 400.)—*Chuck v. Harris*, 2 Scott's N. R. 82.
4. (*Service of rule.*) Service of a rule to compute on one of several defendants, who have suffered judgment by default, is sufficient. (2 C. & M. 424.)—*Arnold v. Evans*, 9 D. P. C. 219.
5. (*Judgment as in case of nonsuit.*) In a country cause issue was joined on the day before Trinity term, and no notice of trial given. A motion for judgment as in case of a nonsuit in Hilary term following was held too soon. (3 M. & W. 276.)—*Downes v. Bostock*, 9 D. P. C. 241.
6. (*Same.*) The fact that the defendant's attorney has improperly possessed him of a document essential to the plaintiff's case, is a sufficient excuse for his not proceeding to trial pursuant to notice.—*Cocker v. Shuttleworth*, 9 D. P. C. 321.
7. (*Same.*) On discharging a rule for judgment as in case of a nonsuit on a peremptory undertaking, the Court will not impose any terms as to security for costs.—*Solomon v. Leek*, 9 D. P. C. 361.
8. (*Staying proceedings.*)—The Courts have unlimited power over their own pro-

- cess, and may stay proceedings in an action brought against good faith, although the agreement was made while the parties were not under the authority of the Court. Where a judge in vacation ordered a stay of proceedings on the ground that they were brought against good faith, a motion on the last day of the next term to rescind that order was held not too late.—*Cocker v. Tempest*, 9 D. P. C. 306.
9. (*Setting aside proceedings for irregularity.*) Where a judgment and execution are set aside for irregularity, the Court has no power to impose on the defendant the term that he shall bring no action. (7 D. P. C. 534; 1 B. & Adol. 275.)—*Adam v. Noble*, 9 D. P. C. 322.
10. (*Judgment as in case of nonsuit.*) Where negotiations for the settlement of the action had proceeded until it was too late for the plaintiff to give due notice of trial, the Court discharged a rule for judgment as in case of a nonsuit for not then proceeding to trial, with costs.—*Alford v. Fellowes*, 9 D. P. C. 326.
11. (*Delivering declaration to prisoner.*) A plaintiff may file his declaration, and serve notice thereof on a defendant who is in custody at the suit of a third person, and is not bound to deliver the declaration.—*Boucher v. Roe*, 9 D. P. C. 329.
12. (*Entering judgment nunc pro tunc.*) Where an instalment upon a cognovit became due after the defendant's death, the Court refused to allow judgment to be entered upon the cognovit nunc pro tunc.—*Blackburn v. Godrick*, 9 D. P. C. 337.
13. (*Setting aside proceedings, time for.*) Where a defendant, by his attorney, entered an appearance, and the plaintiff afterwards entered one for him, filed a declaration, and served notice on the defendant in the country; the Court held that the objection to the plaintiff's proceedings amounted to an irregularity only, and therefore that the defendant was bound to come to the Court promptly after the service on him of the notice of declaration.—*Alsager v. Crisp*, 9 D. P. C. 353.
14. (*Stay of proceedings, what is.*) The defendant, on the 19th November, delivered a demurrer to a declaration wrongly entitled. On the 20th the plaintiff signed judgment for want of a plea. On the 21st the defendant obtained a summons at chambers to set aside the judgment, and on the same day the plaintiff obtained a rule nisi to compute, which, before the summons was heard, he made absolute: Held, that the summons operated as a stay of the plaintiff's proceedings, and therefore that the rule absolute to compute must be set aside.—*Trego v. Tatham*, 9 D. P. C. 379.
15. (*Judgment as in case of nonsuit.*) Where the plaintiff proceeded against the defendant both at law and in equity, but elected to proceed in the Court of Chancery, default having been made at law, the defendant was held entitled to judgment as in case of a nonsuit. (2 Anst. 568.)—*Johnstone v. Pring*, 9 D. P. C. 396.
16. (*Same.*) In order to discharge a rule for judgment as in case of a nonsuit, on the ground of the defendant's insolvency, it must appear on the plaintiff's affidavit that he did not know of that insolvency until after the last step taken by him towards bringing the cause to trial.—*Fisher v. Lediard*, 9 D. P. C. 545.
17. (*Setting aside proceedings, time for.*) After a delay from the 13th March to the 16th April, it was held too late to object to a misdescription in the issue, of the date of the writ, although the defendant, who was not an attorney, conducted his defence in person.—*Currey v. Bowker*, 9 D. P. C. 523.

18. (*Setting aside proceedings for irregularity, time for.*) Where a levy was made on the goods of the accommodation acceptor of a bill of exchange, on the 15th February, it was held too late to apply on the 3rd day of the following Easter term, to set aside those proceedings on the ground that no process had been served on the defendant, as this only made the proceedings irregular, and not null.—*Holmes v. Russel*, 9 D. P. C. 487.

19. (*Service of notice of declaration.*) The defendant having been served personally with a writ of summons at his place of business, and not making any mention of a different place of residence, notice of declaration was held well served at the same place.—*Hoare v. Robinson*, 9 D. P. C. 533.

20. (*Right to begin.*) The rule of the judges as to the right to begin, does not extend to actions of covenant, nor (*semble*) to any cases of contract.

In assumpsit by the marshal of the Queen's Bench, the declaration stated that in consideration that the plaintiff would allow J. W., a prisoner for debt, to reside within the rules, the defendant promised to indemnify the plaintiff from any escape of J. W.; that the plaintiff did allow J. W. to reside within the rules, and that he escaped, and that the plaintiff was sued and obliged to pay the amount for which J. W. was imprisoned, and the expenses: plea, that A. the execution creditor, and others, conspired to cause another creditor of J. W. to sue out a bailable writ against him, and to cause him if he should go beyond the rules to be arrested and detained till A. could commence an action against the marshal for an escape; that in pursuance of such conspiracy a bailable writ was sued out by S., a creditor of J. W., and a warrant granted thereon, on which J. W. was arrested and detained out of the rules until the marshal was sued for the escape, and that J. W. could and would have returned into the rules before any action could have been commenced, if he had not been so arrested; and that the plaintiff well knew the premises, and would not plead the same as a defence to A.'s action against him, and would not allow the defendant to defend that action: Replication admitting the writ and warrant, with *de injuriâ* as to the residue: Held, that on these pleadings the defendant should begin, although the plaintiff would have to prove the amount of his damages, if the defendant failed in proving his plea.—*Chapman v. Emden*, 9 C. & P. 712.

21. (*Right to begin.*) Declaration in covenant stated that the defendant covenanted to occupy certain demised premises in a proper manner, and to keep them in repair. Breaches, that the defendant did not occupy in a proper manner, and did not keep the premises in repair; plea, that the defendant did occupy in a proper manner, and did keep the premises in repair: Held, that the plaintiff had the right to begin.—*Doe d. Trustees of Worcester Schools, &c. v. Rowlands*, 9 C. & P. 734.

PRISONER.

(*Discharge of small debtor.*) If a prisoner had enjoyed the privilege of the rules during any part of the twelve months he cannot be discharged under the 48 G. 3, c. 123, (4 Ad. & E. 1007; 2 M. & W. 311; 5 D. P. C. 520).—*Eiffe v. Jacob*, 9 D. P. C. 345.

And see PRACTICE, 11.

PRIVILEGE OF PARLIAMENT.

In an action against a member of parliament, it is not competent for the plaintiff, either on mesne or final process, to sue out writs for the purpose of proceeding to

outlawry, though he may have no present intention of putting them in execution. (1 Leon. 329; 4 Taunt. 668; 3 M. & Selw. 88.)—*Cassidy v. Stewart*, 9 D. P. C. 366.

PROCESS.

1. (*Indorsement on writ of summons.*) The copy of a writ of summons was indorsed as follows: "This writ was issued by A. B. of &c., attorney for the said—," without mentioning whom. The Court set aside the copy of service.—*Ward v. Lloyd*, 9 D. P. C. 213.
2. (*Affidavit for capias under 1 & 2 Vict. c. 110.*) An affidavit to obtain a capias under the 1 & 2 Vict. c. 110, s. 3, if made before the writ of summons is sued out, need not be intitled in the cause.—*Schelleter v. Cohen*, 9 D. P. C. 277.
3. (*Distringas.*) The Court refused a distringas where, upon the second application, the answer was "that the defendant was on his way to Scotland;" and on the third, that "he was gone to Calais;" it not appearing that those answers were untrue.—*Beverley v. Christie*, 9 D. P. C. 293.
4. (*Writ of summons—Duration.*) A writ of summons was sued out in May, but was not served within four months. In November, the defendant called on the plaintiff's attorney, and consented to accept service of a copy of the writ, to avoid further expense: Held, a waiver of the objection that the operation of the writ had ceased.—*Coates v. Sandy*, 9 D. P. C. 381.
5. (*Distringas.*) In making appointments for service of the writ of summons, for the purpose of obtaining a distringas, the hour of appointment must be mentioned, although there may be some reason to believe that the defendant is wilfully keeping out of the way.—*Newman v. Hicknan*, 9 D. P. C. 546.
6. (*Distringas.*) It is not of itself any objection to a writ of distringas, that it issued after the expiration of four months from the issuing of the writ of summons. (7 D. P. C. 304.)—*Bromage v. Ray*, 9 D. P. C. 559.
7. (*Continuing process—Concurrent writs.*) After an insufficient levy under a f. fa. in Yorkshire, where the venue in the action was laid, the plaintiff on the 6th of July issued a ca. sa. reciting the f. fa. return into Middlesex, for the residue. On the 31st August, and before the execution of this latter writ, the plaintiff issued a ca. sa. for the residue into Yorkshire, under which the defendant was taken, but was discharged on the ground of privilege. In January following, he was taken under the Middlesex writ: Held, that the writ into Middlesex ought to have been a testatum ca. sa. founded on a ca. sa. into Yorkshire, and was irregular; that the Court could not amend it by the ca. sa. into Yorkshire, which bore a later date, and that the defendant was entitled to his discharge.—*Towers v. Newton*, 9 D. P. C. 576.

PROCHEIN AMY.

The wife of a minor, who was in India, having committed adultery, his father procured himself to be appointed his prochein amy, and commenced an action for crim. con. without the son's knowledge or authority: Held, that he was entitled to do so, and that the judgment in that action would be a bar to any proceedings for the same cause of action by the son when of age. For a prochein amy is a guardian appointed by the Court, who may sue without any authority from the infant. (1 Eq. Ca. Abr. 72; F. N. B. 26; Cro. Jac. 640.)—*Morgan v. Thorne*, 9 D. P. C. 226.

QUO WARRANTO.

1. On a motion for a quo warranto, an affidavit stating that it is the deponent's in-

tention, in case the Court should direct the information to be filed, to become *bonâ fide* the relator, is insufficient within the rule of M. T. 3 Vict.—*Reg. v. Hedges*, 9 D. P. C. 493.

2. After a rule for a *quo warranto* information has been made absolute, the Court will change the relator on motion made on his behalf, if, by reason of his necessary absence from England in the conduct of his own private affairs, he is unable to enter into the recognizance required by the 4 & 5 W. & M. c. 18, s. 2. (2 M. & Selw. 346.)—*Reg. v. Quayle*, 9 D. P. C. 548.

RAILWAY ACT.

1. (*Certiorari to remove inquisition under.*) A railway act (6 & 7 W. 4, c. 36,) directed that compensation for lands taken by the company in certain cases should be assessed by a special jury; that the deviation from the line of railway mentioned in the act should not exceed a specified distance; and that no proceedings taken in pursuance of the act should be removed by *certiorari*. A *certiorari* was applied for to remove an inquisition, on affidavit that the jury appeared by the inquisition not to be special, though the case was one in which a special jury was requisite; and that there had been a deviation greater than the act allowed. The writ was refused, because, if the proceedings were in pursuance of the act, the *certiorari* was taken away, and if not in pursuance of the act, they were merely void.—*Reg. v. Bristol and Exeter Railway Company*, 11 Ad. & E. 202, n.
2. (*Construction of—Notice of calls—Pleading.*) In an action by a railway company for calls, the declaration alleged that “the defendant subscribed for a large sum of money, to wit, £5000, towards the undertaking mentioned in the act,” &c. The company were empowered by the 3rd section of the act to raise a million of money for constructing and maintaining the railway; and by the 195th section it appeared that £660,000 had been subscribed for by several persons, under a contract binding themselves and their heirs, before the passing of the act. A motion having been made in arrest of judgment, on the ground that the declaration should have alleged a subscription by deed: Held, that the declaration was good after verdict.

Semble, that it would have been also good on special demurrer.

By the 121st section, the directors were empowered to make calls, the aggregate amount not to exceed £100, and no call to exceed £10 upon each share, and an interval of three calendar months was to elapse between the days of payment of each call. It also required that twenty-one days’ notice should be given of every call, by advertisement in certain newspapers, and enacted that all money so called for should be paid to such persons, at such times and places, as in the said notice should be appointed. A resolution of the directors was made for a call of £8 per share; but the resolution, although it mentioned the period within which the call was to be paid, did not specify the place where, or person to whom, the payment was to be made. The notice of that call, inserted in the local newspapers, according to the directions of the act, specified the time and place of payment and the persons to whom the payment was to be made: Held, first, that the publication of the notice must be assumed to be the act of the directors; secondly, that the call was properly made.—*Great North of England Railway v. Biddulph*, 7 M. & W. 243.

RAPE.

In order to constitute the complete offence of rape it is not necessary that the hymen

should have been ruptured. (1 East, P. C. 438. The case of *R. v. Gammon*, 5 C. & P. 321, is not law.)—*Reg. v. Hughes*, 9 C. & P. 752.

SCOTCH MARRIAGE.

A person born in Scotland, of parents domiciled there, but not married until after his birth, although legitimate by the law of Scotland, cannot take real estate in England as heir.—*Doe d. Birtwhistle v. Vardill*, (in the House of Lords,) 6 Bing. N. C. 385; 1 Scott, N. R. 828.

SHERIFF.

1. (*Action against for excess levied under a fi. fa.—Tender—Evidence.*) The sheriff seized goods in the possession of S., to satisfy a fi. fa. issued against him upon a judgment of nonsuit for 67*l.* S. had previously conveyed all his estate and effects to H. by a deed which it was contended was fraudulent and void against creditors: and H. gave notice to the sheriff's officer not to sell, and demanded the goods. The officer refused to deliver them except on payment of 97*l.* (the additional 30*l.* being claimed for poundage, expenses, &c.) which the person sent by H. to demand the goods paid under protest. The sheriff, being ruled to return the writ, returned that he had levied of the goods and chattels of the plaintiff S. the sum of 67*l.* In an action for money had and received, brought by S. against the sheriff to recover back the 30*l.*: Held, that it was not necessary to prove a tender of the 67*l.*

Held, also, that a letter from the under-sheriff to the officer in possession, directing him to demand only the 67*l.*, if S. came to pay the amount of the execution, was not admissible in evidence on behalf of the defendants.

Held, however, that it was a question for the jury, and ought to have been left to them, whether the money paid to redeem the goods was the money of S. or not, and that if it was not, he was not entitled to recover; and that the sheriff was not estopped by his return to say that the excess beyond the 67*l.* was not the money of S.—*Scarfe v. Hallifax*, 7 M. & W. 288.

- 2: (*Fees of.*) A sheriff cannot claim greater fees than are allowed by the table of fees framed under the statute 1 Vict. c. 55, although he may have been put to extra trouble and expense in making the levy.—*Slater v. Haines*, 9 D. P. C. 221.
3. (*Poundage.*) A sheriff is entitled to poundage only upon the real debt bona fide due from the defendant. Therefore where the sheriff took a debtor in execution under a ca. sa. indorsed by mistake for a larger sum than that really due, which mistake was afterwards amended by a judge's order: Held, that the sheriff's claim to poundage must be regulated accordingly.—*Evans v. Maners*, 9 D. P. C. 256.
4. (*Return to fi. fa.*) A return by a sheriff to a fieri facias that the defendant's premises are so barricaded that he is unable to ascertain whether the defendant has goods within the bailiwick, is bad.—*Munk v. Cass*, 9 D. P. C. 332.

SHIPPING.

- (*Authority of master to sell ship—Ratification of sale by owner—Registry Act.*)
Semble, that the master of a ship has authority, when, in consequence of injury to the ship during the voyage, there is no prospect of bringing her to the termination of the voyage, to sell her for the benefit of all parties interested. (10 East, 143; 5 Esp. 65; 2 B. & C. 691; 1 Bing. 445.)

At all events where the proceeds of such sale have been received by the owner, that is a sufficient ratification by him of the act of the master in selling her, so as

to prevent him from afterwards recovering back the ship from the purchaser or one claiming under him.

So, it is equally a ratification of a sale by an auctioneer, acting under a parol authority from the master.

And where, under such circumstances, the ship was transferred by an instrument executed by the auctioneer, *under seal*, but in other respects complying with the requisitions of the Registry Act, 3 & 4 Will. 4, c. 55, s. 31, it was held, that the ratification of the owner was sufficient to give validity to the transfer; for that, as the statute does not require a transfer *under seal*, the instrument might have the effect of a written transfer by the master according to the statute, as well as that of the deed of the auctioneer.

The purchaser of a vessel under such circumstances cannot set up any defence of *lien* against an action of *trover* by the owner.—*Hunter v. Parker*, 7 M. & W. 322.

And see DEMURRAGE.

STAMP.

1. (*On bond*.) A bond, dated in June, was conditioned for the payment of 3000*l.* with interest at five per cent. from the 1st March preceding. A 7*l.* stamp was held sufficient. (4 B. & Ald. 204; 1 M. & Rob. 115; 2 Ad. & E. 9.)—*Parker v. Smart*, 9 D. P. C. 211.
2. (*On agreement—Number of words, how calculated*.) An agreement for the sale of a public house stated, that the sale was subject to the covenants "set forth in a draft of a lease delivered this day." The agreement itself contained less than 1080 words: Held, that the covenants referred to were not to be taken into account in calculating the amount of the stamp duty, and therefore that a 1*l.* stamp was sufficient. (7 B. & C. 396.)—*Sneezum v. Marshall*, 9 D. P. C. 267.
3. The officer of the Court, when called upon to draw up a rule for an attachment for non-performance of an award, may object to the want of a stamp on the award and refuse therefore to draw up the rule.—*Hill v. Slocombe*, 9 D. P. C. 339.

TROVER.

(*By administrator—Administration de bonis non, when necessary to his title*.) L. was possessed of furniture and other property, and on his death, intestate, in 1827, the furniture was removed by his widow to another house, in which she resided, until her death in 1832, with her daughter E., and continued during that period to use the furniture. In October, 1829, the widow caused the furniture to be valued, in order to her taking out administration to L., which she afterwards did. In 1838 the furniture was sold by the defendant, (who had married another daughter of L.) with E.'s concurrence. In 1840, (disputes having arisen about the distribution of the proceeds), E. took out administration to her mother: Held, that E. could not maintain *trover* for the furniture, without having taken out administration *de bonis non* to L.—*Elliott v. Kemp*, 7 M. & W. 306.

And see BANKRUPTCY, 1.

USURY.

In *trover* by the assignees of a bankrupt, the defendant pleaded that before the bankruptcy, he lent the bankrupt money on the deposit of the goods in question. Replication, that it was corruptly and against the form of the statute agreed between the defendant and the bankrupt, that the bankrupt should pay the defendant for the loan of the money above 10 per cent. interest: Held, on special de-

murrer, that the averment of the agreement being against the form of the statute was not a sufficient allegation of its illegality; and that the replication was bad, for not alleging either that the contract was made before the stat. 1 Vict. c. 80 and 2 & 3 Vict. c. 37, came into operation, or that it was excepted out of their provisions.—*Turquand v. Mosdon*, 9 D. P. C. 282.

VARIANCE. See **AMENDMENT**, 1, 3; **PLEADING**, 2.

VENDOR AND PURCHASER.

(*Contract for good title, when broken.*) The declaration stated, that the defendant caused to be put up for sale by auction certain premises, for the residue of a term of years, on the condition, amongst others, that the defendant should deduce and make a good title thereto, commencing with the lease of the premises under which they were then held; and assigned as a breach, that the defendant did not deduce a good title commencing with the lease.

Plea, that the premises so put up to sale were premises of which the defendant was possessed under a mortgage from the plaintiff for the residue of the term, and that they were put up to sale under a power of sale in the mortgage: that before and at the time of the mortgage, the plaintiff held the premises under a lease from T. L., subject to a covenant by the plaintiff to repair, and a proviso for re-entry, or the cesser of the term, at the option of T. L., on breach of such covenant: that the plaintiff, before and at the time of the sale, had full knowledge of all the premises: that the defendant did deduce a good title to the premises, commencing with the lease, in all respects except this, that the premises were out of repair, of which the plaintiff had full knowledge: that they were, at the time of the sale, in as good repair as at the time of the mortgage: and that T. L. had not re-entered or claimed to re-enter, or in any way avoided the lease:—Held bad on general demurrer.—*Barnett v. Wheeler*, 7 M. & W. 364.

And see **PLEADING**, 7.

VENUE.

(*Undertaking to give material evidence in particular county, how satisfied.*) An undertaking to give material evidence of some matter in issue arising in a particular county, is satisfied by evidence arising in that county, which bears on the amount of damages.

In an action for breach of warranty of a horse, in which the issue raised on the pleadings was, whether the plaintiff bought the horse of the defendant or not, payment in Middlesex of the keep of the horse, after notice to defendant of its unsoundness, was held sufficient to satisfy the undertaking to give material evidence in that county.

Quære, whether a letter of the plaintiff's attorney to the defendant, written in Middlesex, but posted in London, giving notice of the unsoundness, and requiring the defendant to take back the horse, otherwise it would be sold by a certain day, (verbal notice to the same effect having been previously given to him,) was sufficient to satisfy such undertaking? (2 B. & Adol. 169; 4 Bing. N. C. 225; 2 C. & J. 639.)—*Greenway v. Titchmarsh*, 7 M. & W. 221; 9 D. P. C. 279.

WARRANT OF ATTORNEY.

1. It is no objection to a judgment on a warrant of attorney, that no appearance has been entered.

The defendant was taken in execution on a judgment entered up on a warrant of attorney, which had been given by him jointly with another, who had previously been taken in execution on a judgment for a larger sum, including that secured by the warrant of attorney. Held regular.—*Bircham v. Tucker*, 8 Scott, 469.

2. A warrant of attorney given by an attorney to induce a party to stay proceedings against him, is illegal and void, and the Court will order it to be taken off the file and cancelled. (1 Campb. 55; 2 Wils. 341.)—*Kirwan v. Goodman*, 9 D. P. C. 330.
3. (*Judgment on old warrant of attorney.*) Under special circumstances, the Court allowed a rule to be made absolute for judgment on an old warrant of attorney, where the service had been effected on the landlady of the house in which the defendant lodged.—*Wortham v. Tuck*, 9 D. P. C. 335.
4. (*When void in case of bankruptcy.*) To render a warrant of attorney void as against the assignees of a bankrupt under the 3 G. 4, c. 39, on the ground of its not having been filed or judgment signed within twenty-one days from its execution, it is not necessary that the petitioning creditor's debt should have accrued within those twenty-one days.—*Everett v. Wells*, 9 D. P. C. 424.
5. (*Attestation.*) A warrant of attorney, to confess judgment for 1000*l.*, was executed by the defendant, and an attestation of the execution was subscribed by an attorney pursuant to the stat. 1 & 2 Vict. c. 110, s. 9. An alteration was afterwards made, by consent, in the sum, by substituting 2000*l.*, and the defendant retraced his signature with a dry pen, and re-delivered the instrument. The attorney, who was present, wrote his initials opposite to the alteration, and drew a dry pen over the attestation and over each letter of his own signature. Held, that this was not a sufficient attestation to satisfy the statute.—*Bailey v. Bellamy*, 9 D. P. C. 507.

And see BANKRUPTCY, 1; COMPUTATION OF TIME.

WARRANT OF COMMITMENT.

(*Backing warrant.*) Where a warrant for the apprehension of a defaulter, under the 3 G. 4, c. 88, s. 3, was issued by commissioners of taxes of the Cambridge district, and was backed by justices of Lancashire and Gloucestershire, and on a return to a habeas corpus it appeared that the defendant was in custody on the warrant in Cambridge gaol, the Court refused to discharge him on a suggestion that he had been apprehended at Cheltenham, he being clearly in legal custody at Cambridge.—*Esparte Sharpe*, 9 D. P. C. 513.

WITNESS.

1. (*Competency of annuitant under will.*) In an action of debt against a devisee on a bond of his testator, in which the question is whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, is not a competent witness for the defendant. (5 B. & Adol. 368.)—*Bloor v. Davies*, 7 M. & W. 235.
2. (*Competency of co-contractor.*) In an action for wages, brought by the secretary of an intended joint stock company against one of the provisional committee, another member of the committee is a competent witness for the defendant,

after a release from him. (4 B. & Adol. 760; 2 M. & W. 199.)—*Beckett v. Wood*, 6 Bing. N. C. 380.

3. (*Mandamus for examination abroad.*) The Court has no power to issue a mandamus for the examination of witnesses in India, in an action at the suit of the crown. (5 Price, 444.)—*Reg. v. Wood*, 9 D. P. C. 310.

And see HIGHWAY.

WRIT OF TRIAL.

A motion for a new trial, in a cause tried under a writ of trial, must be made on affidavit verifying the judge's notes, as well where the trial took place before the judge of an inferior Court of Record as before the sheriff.—*Eden v. Bretton*, 9 D. P. C. 245.

YARMOUTH HAVEN TOLLS.

The corporation of Great Yarmouth has no claim, under the 5 & 6 W. 4, c. xlix., to compensation pursuant to 59 G. 3, c. 54, s. 9, and 1 & 2 Vict. c. 113, s. 27, for the diminution of duty on foreign vessels importing and exporting commodities into and out of the haven, in consequence of commercial conventions between England and foreign powers, notwithstanding the general language of the 5 & 6 W. 4, c. xlix., s. 128.—*Reg. v. Trinity House*, 9 D. P. C. 565.

EQUITY.

[Containing cases in 10 Simons, Part 2; and 4 Younge & Collyer, Part 1.]

ACCOUNT.

1. (*Particular and general.*) Where an inquiry was directed as to a particular account, and the defendant in his answer and his examination set up a general account, but could not prove before the master such items as were to his credit: Held, that the master was justified in taking out of the general account, and transferring to the particular, an item of charge admitted by the defendant on the face of his general account.—*Crapper v. Knapman*, Y. & C. 249.
2. (*Profits of lead mine.*) An account for a limited time being given against one of two tenants of a lead mine, it was held that the account must be limited by reference to the time when the portions of the produce were assigned to the accounting party, and not by the time when he received the money for the sale of such portions.—*Denys v. Shuckburgh*, Y. & C. 42.
3. (*Tenant in common—Mistake.*) Where one of two tenants in common had, by a misapprehension common to both, received more than her share from 1830 to 1835, when she died, and the mistake being discovered in 1835 by the survivor, by inspection of a deed which had been in his possession since 1826, he filed his bill for an account against the representatives of the other: Held, that this was the proper mode of obtaining relief, (there not being any action at law for mesne profits between tenants in common); but that under the circumstances the account was confined to six years from the filing of the bill, with an extension back to the year 1832, the plaintiff having gone abroad at that time.—*S. C.*
4. (*Tenants in common—Mortgage.*) Held, on demurrer, that the mortgagee of a share of one tenant in common of a mine might file a bill for an account against the mortgagor and his co-tenants in common.—*Bentley v. Bates*, Y. & C. 182.

And see INFANT, 3.

ADMINISTRATION OF ASSETS.

- (*Sale of real estate—Infant.*) *Seemle*, that the direction for sale of real estate for payment of debts, in case the personal should be insufficient, will not be made at the hearing, except by consent; and in the case of an infant heir, the Court refused to make such order till after a reference as to the sufficiency of the personalty.—*Baillie v. Jackson*, S. 167.

APPORTIONMENT.

- (*Dividends of stock.*) A tenant for life of stock comprised in a settlement (made previous to the 4 & 5 Will. 4, c. 22,) died on the day on which the half-year's dividends became due: Held, that they belonged to his estate.—*Paton v. Sheppard*, S. 186.

BANKRUPTCY.

1. (*Partial conveyance in trust.*) Held, in a suit for specific performance, that a conveyance by trader of part of his estate for the benefit of his creditors, made without fraudulent intention, was not an act of bankruptcy.—*Cattell v. Corral*, Y. & C. 228.
2. (*Security.*) It is no defence to a suit in equity by a mortgagee against a bankrupt mortgagor, that proof has been made under the commission as upon a debt without security. The effect of such a circumstance is to be considered in bankruptcy.—*Grugson v. Gerrard*, Y. & C. 119.

CASE.

(*Correction of error.*) A mistake in the framing of a case corrected, and a fresh case directed.—*Spry v. Bromfield*, S. 224. (S. C. 10 Sim. 94, L. M., No. 52.)

CHARGE.

(*Covenant.*) By articles of separation between husband and wife, dated in June, 1834, A., the husband, covenanted that he would on or before the 1st of February, 1835, either by a charge on freehold estate of inheritance, or by investing an adequate sum in the purchase of stock, or by the best means which might be then in his power, secure an annuity of 1000*l.* to his wife's trustee. In the following December he joined with his son in limiting certain estates, of which A. was tenant for life and the son tenant in tail, to trustees to raise the sum of 462,000*l.* to pay off incumbrances, and to pay the surplus to A., and subject to the above trust, in trust as A. and his son should appoint, and subject thereto to A. for life, remainder to his son in fee if he survived A., if not, to his son in tail, remainder to A. in fee, with a power to A. to charge the estate with a jointure of 1500*l.* for his then or any future wife: Held, on demurrer by the trustees, that the deed of December must be taken to have been made in pursuance of the articles, and that the wife was entitled to have the provisions of the deed for the benefit of the husband applied in performance of his covenant.

The demurrer was allowed for want of parties; as the persons having interests under the deed of December, of which the bill sought to carry out the trusts, ought to have been made defendants.

On appeal against the overruling of the demurrer for want of equity, the decision of the Vice-Chancellor was affirmed.—*Wellesley v. Wellesley*, S. 256.

COMPOSITION DEED. See **BANKRUPTCY**; **PARTIES**.

CONSTRUCTION OF STATUTES. See **INFANT**; **MUNICIPAL CORPORATION Act**.

CONTEMPT.

(*Injunction—Trial.*) Plaintiff having obtained an injunction, with a direction to try his right in an action, the defendant some time after moved that he should bring his action at the next assizes, or that the injunction should be dissolved. The Court refused the motion with costs, but intimated that the plaintiff should proceed to trial at the next assizes but one. Shortly before these came on, the defendant being in contempt for non-payment of the costs of the motion, the plaintiff moved to defer the trial till the contempt should have been cleared: Motion refused without costs.—*Bickford v. Skewes*, S. 193.

CONVERSION.

(*Contract for sale.*) By a contract for sale of land, by which a day was fixed for the completion of the purchase, it was stipulated that up to that day the rent

and other profits should belong to the vendor, his heirs, executors, and administrators : Held, that the intermediate rent belonged to the heir.—*Shadforth v. Temple*, S. 184.

COSTS.

1. (*Advancement of cause.*) Costs of an opposed application to advance a cause, which was granted, made costs in the cause.—*Carthew v. Barclay*, S. 273.
2. (*Amendment.*) The original bill prayed for the foreclosure of a mortgage, and the transfer of a sum of stock. Upon the facts disclosed by the answer, and under the advice of counsel, the bill was amended by striking out all the part relating to the mortgage, which formed nearly one-half of the bill, and also of the answer. The plaintiff applied for the full costs, arising from the part of bill which was so struck out, and relied on the authority of *Mavor v. Dry*, 2 S. & S. 113, and other cases ; see 1 Daniell's Practice, 517, 518. The Court refused the motion, the amendment not being vexatious as in those cases.—*Monck v. Earl of Tankerville*, S. 284.

And see EXECUTOR ; MORTGAGE.

DEBTOR AND CREDITOR.

- (*Creditor having security—Vendor's lien.*) Vendor of an estate in a suit against the purchaser, obtained by consent a decree for specific performance, with a direction that if the purchase-money were not paid by a particular day the estate might be sold, the proceeds paid to the vendor and the purchaser be answerable for the deficiency, and before the day arrived the purchaser died ; the estate was then sold, and the proceeds were deficient. Held, that under the circumstances the vendor could only prove for the balance against the purchaser's estate, but the Court disapproved of the doctrine of *Greenwood v. Taylor*, 1 Russ. & M. 185, as applicable to the ordinary case of a mortgagee proving in a creditor's suit. (*Mason v. Bogg*, 2 M. & C. 443.)—*Rowe v. Young*, Y. & C. 204. (See S. C. 3 Y. & C. 199.)

And see BANKRUPTCY.

DEED.

- (*Delivery.*) A. being indebted to his bankers, executed a deed of mortgage to them, which he delivered to his own attorney, who, a month afterwards, in the course of which A. had become bankrupt, handed it over to the mortgagees. Held, that there was a good delivery of the deed at the time of the execution, there being no evidence of intention to deliver it as an escrow.—*Grugson v. Gerrard*, Y. & C. 119.

DISCOVERY.

- (*Forfeiture—Money lent at play.*) The liability to forfeiture of securities for money lent at play, under the stat. 9 Ann, c. 14, is not a ground for exempting a party from discovering at the suit of the debtor, against whom he has brought his action, whether the money was lent at play.—*Sloman v. Kelly*, Y. & C. 169.

DONATIO MORTIS CAUSA.

- (*Reserved right of revoking.*) A., being in a declining state of health, delivered to B. a locked cash-box, telling her at his death to go to his son for the key ; and saying that it contained money, and was for herself and sister, but adding, that he should want it from her every three months while he lived. A. lived some months after this, during which time he twice sent for the box (which was delivered up by B.), for the purpose it seemed of renewing the cheques it con-

tained. Shortly after the second return of the box he died; and the box being broken open, upon the refusal of the son to deliver up the key, was found to contain two cheques given to A. by a debtor of his, and one of them directed under cover to B., the other in like manner to her sister. The key was found to have a label with the name of B. on it. Held, that this was not a sufficient *donatio mortis causa*, by reason of the implied right of resumption.—*Riddel v. Dobres*, S. 244.

DUCHY OF LANCASTER. See JURISDICTION.

EVIDENCE.

(*Recital*.) In 1792, A. and his wife conveyed to B. by deed, purporting to convey the fee, and to be made in consideration of money, two estates, M. and F., the property of the wife, and a fine was afterwards levied to the uses of the deed. In 1798, A. and his wife execute another deed, purporting to convey estate M. in fee, for another sum of money, and declaring that the fine previously levied should enure to the uses of such deed. In the same year, 1798, another deed is executed, by which, after reciting that the original deed, including the two estates, was by way of mortgage, and also that A. and his wife had only an interest in estate F. for the life of the wife, that estate was for a further sum of money absolutely assigned to B. for the life of the wife. B. had never executed the last-mentioned deed, though it was delivered to him; and about this time he first entered into possession of both estates, and remained in possession until the death of B.'s wife in 1834, when he gave up estate F. In 1839 the son of A., and heir of his wife, filed his bill for the recovery of estate M., on the ground that the original deed was only a mortgage, and that the deed of 1798, being executed after the fine, was an imperfect conveyance of the equity of redemption, but that it was sufficient to pass a life interest in the estate during the life of A.'s wife, and therefore to exclude the title which B. might otherwise set up by adverse possession as mortgagee. The Court dismissed the bill on the ground that there was no sufficient evidence that the original transaction was only a mortgage.—*Tull v. Owen*, Y. & C. 192.

EXAMINATION OF WITNESS.

(*Irregular order*.) Depositions having been suppressed for irregularity in the order under which they had been taken, and a fresh order for examination having been obtained, the examiner read over to the witnesses their depositions under the former order, and upon their saying they were correct, he caused the witnesses to sign them. These depositions were again suppressed as irregular.—*Attorney-General v. Nethercote*, S. 311.

EXECUTOR.

(*Negligence—insurance—costs*.) An executor held not liable for loss by non-insurance of house and premises, though they had been insured by testator up to his death; but the surviving partner of the testator, who had an interest in the premises, was equally a party to the omission. Held also in the same case that the executor, though liable for loss upon several items, was entitled to his costs of the suit.—*Bailey v. Gould*, Y. & C. 221.

HUSBAND AND WIFE.

1. (*Lunatic—allowance to husband*.) A wife who was of unsound mind, being entitled to 500*l.* out of property in the cause, besides an annuity of 100*l.* to her separate use, the Court refused to allow the husband more than the 500*l.* for

the expense of maintaining her, though the husband showed by affidavits that that sum was insufficient to meet the expenses; but he did not state positively his own inability from other sources.—*Nettleship v. Nettleship*, 8. 236.

2. (*Separate property—Wife's savings.*) A husband is entitled in his marital rights, and without taking out administration, to monies saved by the wife out of her separate property, and left by her undisposed of.—*Molony v. Kennedy*, S. 254.

And see SEPARATION DEED.

INCLOSURE.

(*Award—Evidence of title.*) An award under an inclosure act is *prima facie* evidence of the land awarded, without stating its tenure, being freehold.—*Cattell v. Corryall*, Y. & C. 228.

INFANT.

1. (11 G. 4 & 1 W. 4, c. 60.) An infant devisee, refusing to convey under decree for sale for payment of testator's debts, was treated as coming within the above statute, and a person appointed to convey in his name.—*Warburton v. Vaughan*, Y. & C. 247.
2. (*Jurisdiction of Vice-Chancellor.*) The Vice-Chancellor has jurisdiction, under 2 & 3 Vict. c. 54, to make orders as to the custody of infants, though the Lord Chancellor and Master of the Rolls are alone mentioned in the act.—*Re Taylor*, S. 291.
3. (*Supplemental suit—Account.*) After decree in a creditor's suit, and accounts taken and reported by Master, and his report confirmed, it was discovered that an infant tenant in tail was a necessary party, and he was so made by a supplemental bill. By decree in that suit the accounts were ordered to be taken over again as against him, with liberty to the Master to adopt any of the accounts before taken, if for the benefit of the infant.—*Baillie v. Jackson*, S. 167.

INJUNCTION. See PRACTICE, 4, 5.

INSOLVENT. See PRACTICE, 3.

JURISDICTION.

1. (*Duchy of Lancaster—Appeal—Lapse of time.*) *Semble*, that when the Chancellor of the duchy of Lancaster reverses or varies the decree of the Vice-Chancellor of the county palatine, he does so in the exercise of an appellate jurisdiction, and not merely as upon a rehearing. At any rate the party complaining of the decree is not barred by lapse of time under twenty years.—*Scarisbrick v. Lord Shelmerdale*, Y. & C. 78.
2. (*Foreign debtor.*) The widow of a party resident in Madeira, who had taken out administration there and in England, having appointed an agent here to get in the monies belonging to the estate, the Court refused an injunction, at the suit of a creditor of the estate, to restrain the agent from transmitting the money to the administratrix in Madeira.—*Wallace v. Campbell*, Y. & C. 167.

And see INFANT.

LIEN.

(*Exoneration.*) Testator devised a real estate to his wife for life, with remainder to the issue of a former marriage; and also gave her two specific legacies, and appointed her executrix jointly with A. and B. The real estate being in mortgage for a term, and the general personal estate being deficient, the specific legacies

of the widow were applied in payment of the mortgage, and the land thereupon was by deed, to which the widow was party as executrix, assigned to a trustee to attend the inheritance. The widow afterwards filed her bill to fix a charge upon the land to the extent of the value of her legacies, but she did not make out any case of fraud, misrepresentation, or ignorance of facts, save that A. and B. were the acting executors, and there were other circumstances adverse to her. Bill dismissed with costs, with liberty to file a new one.—*Toplis v. Von der Heyde*, Y. & C. 173.

MISTAKE.

(*Law or fact.*) Mistake of rights under a deed may be treated as a mistake of fact, when it consists not in misconstruction, but in overlooking a plain clause; such as that the estate was limited for ninety years, "if A. should so long live," the latter words having been overlooked.—*Denys v. Shuckburgh*, Y. & C. 42.

MORTGAGEE.

1. (*Costs.*) A mortgagee by deposit, without memorandum, will in equity be allowed his costs against the assignees of insolvent mortgagor.—*The Queen v. Chambers*, Y. & C. 56.
2. (*Same.*) On a suit brought by first mortgagee for a sale, to which the second mortgagee was made party and consented to the sale, held that the latter was entitled to his costs, though the proceeds were not enough to pay the first mortgage.—*Cooke v. Brown*, Y. & C. 227.
3. (*Costs of re conveyance—Infant heir.*) The mortgagor was held liable to pay the costs of an inquiry under 11 G. 4 & 1 W. 4, c. 60, under which the infant heir of mortgagee was found a trustee for the executor, and ordered to reconvey upon payment of principal and interest.—*Exp. Ommaney*, S. 298.
4. (*Rights of mortgagee after tender.*) It is no defence to the suit of a mortgagee to foreclose, or, as the case was, to get in the legal estate from a prior satisfied mortgagee, that a tender of the money due has been made to him, though if such tender was sufficient he would be liable to costs for persisting in his suit.—*Grugon v. Gerrard*, Y. & C. 119.

And see ACCOUNT, 2; COSTS, 1, 2.

MUNICIPAL CORPORATION ACT.

(*Money from sale of land.*) The trusts created or declared by 5 & 6 W. 4, c. 76, s. 92, apply to personal as well as to real property of corporations; and where money, the produce of land of the corporation taken by the crown under the Public Fortifications Acts of 43 & 44 G. 3, had been paid long ago into Court under those acts, and by those acts the Court was authorized to make such order concerning the money, for the benefit of the parties interested, as the Court should think fit, the Court refused to order any part of the principal of such money to be sold out for the payment of debts of the corporation, incurred since the passing of the Municipal Corporation Act.—*Exp. the Corporation of Hythe, In the matter of the Public Fortifications Acts*, Y. & C. 55.

PARTIES.

1. (*Annuity.*) It is settled practice that a bill cannot be brought for the arrears of an annuity without making the grantor a party, although out of the jurisdiction.—*Smythe v. Chambers*, Y. & C. 40.
2. (*Assignee.*) Where a legacy has been assigned prior to the institution of a

suit brought by the legatee to recover it, the assignee is a necessary party to such suit.—*Campbell v. Dickens*, Y. & C. 17.

3. (*Composition deed*.) The debtor is a necessary party to a deed filed by a creditor against the trustees of a deed for the benefit of creditors, seeking to carry out the deed, unless it is very clear that there will be no surplus, and such fact must appear distinctly on the bill.—*Bedford v. Gates*, Y. & C. 21.

And see SPECIFIC PERFORMANCE, 3.

PARTITION. See PRACTICE IN EXCHEQUER.

PERPETUITY.

- (*Power*.) An estate was devised in strict settlement to A. and his children (in tail), with remainder to B. and her children in like manner, with remainder to right heirs of testator; and by the will a power of leasing was given to the trustees, to take effect during the minority of any child who, by virtue of the will, should at any time be entitled to the possession of the estate:—Held, that the power was good, as it might be barred, by recovery, by A. and his eldest son when of age.—*Wallis v. Freestone*, S. 225.

PLEADING.

1. (*Answer—Insufficiency*.) A material statement must be answered, though not interrogated to; and the exception referring to it, as being in the form of a question, was held sufficient, as it plainly pointed out the passage.—*Woodroffe v. Daniel*, S. 243.
2. (*Exception to report*.) The Master having allowed all the exceptions taken to a bill for impertinence, the plaintiff took one exception to the report, alleging that the Master “ought not to have certified the bill to be impertinent on all such points:” Held, that it was sufficient, to support such exception, to show that the Master had been wrong in allowing some of the exceptions.—*Woods v. Woods*, S. 197.
3. (*Revivor and supplement—Impertinence*.) A defendant died after putting in his answer, and having devised land which it was the object of the suit to recover. The bill filed against his devisee set forth the greater part of the original bill, and added to it, by way of pretence and charge, many of the passages in the answer, which it would have been proper to meet by amended bill, if the defendant had lived. Held, overruling the Master’s report upon exceptions, that the bill was not impertinent in either of the above respects.—S. C.

POWER.

- (*Appointment—Description of subject*.) A. having a power of appointment over 3000*l.*, and the accumulations thereon, which had been blended by the trustees of the fund with money which absolutely belonged to her, appointed by will “the said fund of 3000*l.* and the accumulations, or the stock in which it might be invested,” upon trust to pay two sums of 2700*l.* and 250*l.* to B., and upon trust to stand possessed of all the residue of the said trust funds upon the same trusts as were declared by her will of her residuary estate; and as to all the residue of her stock in the public funds, and all her monies and securities, she gave it upon certain trusts to B., who died in the lifetime of the testatrix:—Held, that the sums of 2700*l.* and 250*l.* were not made part of the residue, but went as unappropriated.—*Easum v. Appleford*, S. 274. (Affirmed on appeal.)

PRACTICE.

1. (*Amendment.*) Where the cause is in that state that as against some defendants an order to amend may be made by the Master, but as against others it can only be made by the Court, it is proper to apply to the Court for the order as to all.—*Matchitt v. Palmer*, S. 241.
2. (*Cross examination—Witness.*) It is the business of a party intending to cross examine a witness in the examiner's office to make an appointment for that purpose with the examiner by whom the cross examination is to be conducted, and he must give notice of the time appointed to the witness and the solicitor of the opposite party.—*Keymer v. Pering*, S. 179.
3. (*Dismissal—Costs.*) The defendant having after the bill filed taken the benefit of the act, when he admitted in his schedule the claim on which the bill was founded, the bill was, on his motion, dismissed for want of prosecution, without costs.—*Blanchard v. Drew*, S. 240.
4. (*Injunction—Affidavits.*) A special injunction was dissolved, with costs, because office copies of the affidavits on which it was grounded had not been obtained when it was moved for.—*Jackson v. Cassidy*, S. 326.
5. (*Injunction—Plea.*) An order nisi for dissolving an injunction cannot be obtained on putting in a plea.—*Wroe v. Clayton*, S. 185.
6. (*Parties.*) A necessary party may be brought before the Court by supplemental bill, if it is too late to do so by amendment.—*Semple v. Price*, S. 238.
7. (*Preliminary inquiries.*) The Court may, under the order of the 5th May, 1839, order preliminary accounts or inquiries, although the cause has been set down for hearing.—*Strother v. Dutton*, S. 288.
8. (*Same.*) But the Court will not make such order unless it is consented to or unless in a very clear case. The Court refused it, where two parties were out of the jurisdiction, and had not answered.—*Meinertzhagen v. Davis*, S. 289.
9. (*Production of document.*) It is not irregular to obtain the four-day order for production of deeds, before the certificate of the defendant's default has been filed; the certificate was filed before the order was delivered out. (See *Harris v. De Tastet*, 1 Sim. & Stu. 263.)—*Askew v. Peddle*, S. 182.

PRACTICE (IN THE EXCHEQUER.)

1. (*Amendment—Supplemental bill.*) Under an order to amend by a certain day by adding parties, or that the bill should be dismissed, plaintiff filed a supplemental bill, containing new matter, against the party required to be added and the original parties: Held, that this was a sufficient compliance with the order, and was the proper course, the new matter being such as it was essential to introduce, and might have been introduced without leave, by supplemental bill. (*Greenwood v. Atkinson*, 5 Sim. 419.)—*Wood v. Wood*, Y. & C. 135.
2. (*Objection for want of parties*) Where a defendant at the hearing insisted upon such an objection, but did not state in his answer as of his own knowledge the circumstances upon which it rested, the cause was ordered to stand over, with liberty to amend, and the costs of the day reserved.—*Campbell v. Dickens*, Y. & C. 17.
3. (*Partition—Costs.*) The Court adopts the rule of the Court of Chancery as to costs in suits for partition.—*Monyns v. Joad*, Y. & C. 134.
4. (*Rehearing—Discretion of Court.*) The granting permission to rehear a cause

after the six months have elapsed from the pronouncing of the decree, is in the discretion of the Court.—*Cooper v. Byron*, Y. & C. 39.

And see COSTS ; INFANT ; INJUNCTION ; PARTIES.

PRESUMPTION.

(*Lapse of time—Situation of parties.*) On the separation of A. and B., husband and wife, in April, 1797, an annuity was settled by the husband on the wife, determinable on payment of 1000*l.* In November, 1797, B. being then living in adultery with C., A. gave C. a bond and warrant of attorney for 1400*l.* Judgment was entered up on the bond, and in 1801 proceedings were taken to enforce it, which were stopped by injunction, and the bond delivered up to the husband on a bill brought by him against the representative of C., who never put in any answer. After that, in 1803, another bond for 537*l.* was given by the husband to the representatives of C., which was paid in 1804.

Upon a bill filed in 1833 by B., the wife, for the arrears of her annuity against the representative of A., the plaintiff being unable to prove any payment of the annuity after 1803, and the defendant producing the two bonds, the one for 537*l.*, with the receipt indorsed, the Court presumed that the first bond had been given in satisfaction of the annuity, and the second in discharge of the whole debt.—*Haworth v. Bostock*, Y. & C. 1. (See *S. C.* on Demurrer, 2 *Younge.*)

PRODUCTION OF DOCUMENTS.

1. (*Common evidence of title.*) The corporation of London having joined with the fellowship porters in filing a bill for an account against certain parties who had invaded an alleged prescriptive right of carrying corn landed on either side the Thames between Yantlet and Staines Bridge, and carried into or out of the city ; the defendants filed a cross bill of discovery, with a view of shewing that the claim was not supported by prescription, and that it was confined, so far as it existed at all, to the portorage of corn landed at Queenhithe or Billingsgate ; and upon the answer of the city of London admitting certain documents, they moved for and obtained the production of certain entries in the corporation books, purporting to be copies of ancient public orders, proclamations, inquisitions, and findings relating to the landing of corn at Queenhithe and Billingsgate, and to the charges for carrying it, but the Court refused production of the fellowship porters' book, containing an account of the sums received by each porter for portorage of grain, and the name of the merchant by whom it was paid, and also of certain cases for the opinion of counsel.—*Combe v. The City of London*, Y. & C. 139.

2. (*Pleading—Belief.*) Where the defendant denied positively the plaintiff's title, but said only *he believed* certain documents which he admitted to be in his possession would not shew the truth of the matter stated in the bill, and he *believed* it would not appear by them that a certain person had committed an act of bankruptcy upon which the title of the plaintiff depended : Held, that the defendant was bound to produce the documents, the denial of their relevancy and utility to the plaintiff not being positive.—*Bannatyne v. Leader*, S. 230.

RAILWAY.

(*Building bridges—Double purpose.*) By the 34th section of a railway act the company were empowered to construct a certain number of bridges, over a river, of a particular description as to height and materials. By the 38th sec-

tion, it was provided, that during the building or repairing of such bridges, they might obstruct the waterway to a certain extent, yet so as to leave a way of a specified height and breadth. By subsequent sections they were restricted from building bridges or obstructing the water-way save as before mentioned. But they were by a general section which followed empowered to construct for the purposes of the act, and subject to its provisions and restrictions, a great number of works either temporary or permanent, and among others bridges over rivers. During the erection of a permanent bridge and for the purpose of making it, they made a temporary bridge, not creating any greater obstruction than was allowed by the 38th section, and they used it also to carry over earth to make their embankment. Held, that they might make such a bridge and use it in that way, the double use not increasing the obstruction—*Priestly v. Manchester and Leeds Railway Company*, Y. & C. 63.

RECEIVER.

(*Purchase by Trustee.*) A receiver was refused in a suit by cestui que trust to set aside a purchase made from him by trustee, the case appearing on bill and answer to be not conclusive, and the purchasing trustee having at any rate a lien to the extent of the money paid.—*George v. Evans*, Y. & C. 211.

RECITAL. See EVIDENCE; TRUSTEE.

SEPARATION DEED.

(*Consideration.*) In a deed of separation purporting to be made on account of unhappy differences of temper, the husband covenanted with trustees of the wife to pay an annuity to her, but there was no covenant of indemnity to him against the wife's debts. Held, nevertheless, that the covenant, though not good as against the creditors of the husband, was good against his estate.—*Clough v. Lambert*, S. 174.

And see PRESUMPTION.

SOLICITOR AND CLIENT.

(*Unauthorized acting—Lien.*) A solicitor having without authority as to the suits in question used the names of parties, to whom he had before acted as solicitor in other matters, held to have no lien for his general bill upon the funds recovered in such suits, but only upon the funds in each suit for the costs in that suit.—*Hall v. Laver*, Y. & C. 216.

SPECIFIC PERFORMANCE.

1. (*Condition of sale—Construction.*) Conditions of sale describing a title as arising under an exchange, by virtue of an award under an inclosure act, construed to mean only, that the title arose under an award, and not to oblige the vendor to show title to lands given by him in exchange.—*Cattell v. Corral*, Y. & C. 228.
2. (*Misdescription—Compensation.*) Where on the sale of a manor by auction the fines were stated in the particulars of sale to be arbitrary, and they were arbitrary on alienation only, but upon descents there were fixed payments in the nature of reliefs, which the defendant sought to distinguish from fines, and by one of the conditions of sale, errors in description were to be a subject for compensation, the Court, at the suit of the purchaser, decreed performance with compensation, leaving it to the master to ascertain in what way the difference could be valued.—*Cudden v. Cartwright*, Y. & C. 25.

3. (*Parties—Tenant—Trespass.*) The purchasers having entered into possession without payment of the purchase money, the vendor and his tenant served them with notice not to trespass, and then the vendor alone filed his bill for specific performance, and to restrain the trespass. Held, by the Lord Chancellor, reversing the decision of the Vice-Chancellor, that the vendor's tenant was not a necessary party.—*Robertson v. The Great Western Railway Company*, S. 314.
4. (*Tenant in tail.*) Held, that a tenancy in tail was a sufficient title in vendor, as by 3 & 4 W. 4, c. 74, he could at any time acquire or convey the fee simple, and the necessary enrolment might be made either by the purchaser or the vendor.—*Cattell v. Corrall*, Y. & C. 223.
5. (*Working of Quarries.*) The plaintiff had agreed to take on lease from the defendant the working of a stone quarry, the defendant agreeing at the same time to purchase and take away and pay for at stated times the produce of the quarry. Held, not to be a case for specific performance, the remedy being at law; (*Waters v. Taylor*, 15 Ves. 10.)—*Booth v. Pollard*, Y. & C. 61.

STATUTE OF LIMITATIONS.

(*Implied promise.*) A deed reciting that A. was indebted to B. in various sums of an unascertained amount, and was willing to pay the amount which might appear to be due, to be ascertained and paid as thereafter mentioned, and the deed then providing for taking the accounts by the arbitration of two persons named in the deed: Held, to take the debt out of the statute, the amount being ascertained by extrinsic parol evidence.—*Cheslyn v. Dalby*, Y. & C. 238.

TENANT IN TAIL. See SPECIFIC PERFORMANCE.

TRUSTEE.

(*Appointment by Court.*) The Court may appoint new trustees under 11 Geo. 4 & 1 Will. 4, c. 60, s. 22, although the instrument creating the trust contains a power to appoint new trustees.—*Re Fauntleroy*, S. 252.

WILL.

1. (*After-purchased land—Codicil.*) Testator by his will gave all his lands in H. and F. to his son A., with limitations over. He afterwards purchased other lands in F., and made a codicil, which he described as "a codicil to be taken as part of his will," and by which he gave his son A., "when in possession of the estates given to him by his will," a power to charge the same: Held, that the after-purchased land passed.—*Yarnold v. Wallis*, Y. & C. 60.
2. (*Description—Furniture.*) Held, that fixtures, such as stoves, passed by the description of household furniture.—*Paton v. Sheppard*, S. 186.
3. (*Discretion—Absolute interest.*) Testator gave 5000*l.* stock to a female infant, to be paid or transferred to, or settled on her, by his executors, by such deed or instrument in writing, as they should think most prudent and proper, on her attaining twenty-one. The infant married in testator's lifetime, and afterwards attained twenty-one. The Court ordered the stock to be transferred to her on her sole receipt.—*Laing v. Laing*, S. 315.
4. (*Election—Release.*) Under a power authorizing only an appointment to A. and B., stock was appointed to A. for life, or until attempted assignment, then remainder on certain trusts for his wife and children, remainder to B. A. and B. also took other interest under the will. The Court sanctioned an arrangement by which the whole of the stock appointed as above was, with B.'s consent, paid to A., he giving up his legacies.—*Kater v. Roget*, Y. & C. 18.

5. (*Estate.*) Testator having by will given real and personal estate upon trust for his daughter for life, afterwards, by codicil referring particularly to the devises and bequests in his will, "revoked all and singular the said devises and bequests so far as related to his daughter," and then, after making a different provision for her, he desired that "such estates, both real and personal, as he had given his daughter by his will, should sink into the residue and go in the same way as that." Held, that the value only of the daughter's interest, and not the fund or land to which they attached, sunk into the residue.—*Ives v. Ives*, Y. & C. 34.
6. (*Gift for maintenance.*) A direction by testator to apply the interest of a fund for the maintenance and education of his infant nephew, without any disposition of the principal, held to give a life interest to the nephew.—*Soames v. Martin*, S. 287. (And see *infra*, 10.)
7. (*Gift to a class—Children to be begotten.*) A bequest to children of other parties, *begotten or to be begotten*, is generally confined to children begotten before the death of testator; and it was so held where there were such bequests occurring among other bequests simply to the children of some other parties, and where the trusts for maintenance, to which the Court will look on such a case, were as applicable to the case of children living at the death, as to that of children born after.—*Butler v. Lowe*, S. 317.
8. (*Implied exclusion.*) Testator, having five children, gave to A., one of them, 2000*l.* for life, with a power to appoint it among her children, but if she should die without leaving a child, then he gave it to such of his children as should be living at his decease, and if either of his said children should die before they should be entitled to receive a share, leaving issue, their shares to go among their children. A. did die without issue: Held, by the Lord Chancellor, reversing the decision of the Vice-Chancellor, that A.'s representatives were entitled to a fifth share.—*Jennings v. Newman*, S. 219.
9. (*Subject of devise—Freeholds and leaseholds.*) Testator devised to trustees all his messuages or tenements, farms, lands, hereditaments and premises in C. and W., and all other his freehold lands and tenements whatsoever, to hold all such his real estate upon trust for his wife for life, remainder to other parties in tail. He also gave all his household goods, &c., and all other his personal estate, to his wife absolutely. The testator was seized in fee of freehold lands in C. and W., and also in S.; but there was no messuage or building on any of the freehold lands, except a barn in S. He also had land in C. for a long term of years, on which there was a farm and buildings; and at his death, and for six years before, he occupied the freeholds and leaseholds as one farm, but they were not contiguous: Held, that the freeholds only passed by the devise to the trustees, but that the leaseholds did pass to the wife as personalty under the residuary bequest.—*Arkell v. Fletcher*, S. 299.
10. (*Trust—Recommendation—Maintenance.*) Testator, after making a certain provision for A., the son of a relation, till he attained the age of sixteen, added, "I then leave him to the care of my trustees to provide for him in some business or profession, and his future maintenance, out of my funded property:" Held, that these words created a trust for placing out A. in business, and also that he was entitled for life to a certain annual sum, the amount of which, as well as of the sum for placing him out, was referred to the Master. (See *Soames v. Martin*, *supra*.)—*Kilvington v. Gray*, S. 293.

11. (*Vesting—Period of division.*) Testator gave residue of his personalty to his wife for life, and then, after giving certain legacies, to be divided among five persons named and their children, the five to take two shares, and the children, one share each: Held, that this was a gift to the five and to all their children *per capita*, coming in *esse* before the death of wife, and not liable to be divested by death before that time.—*Cooke v. Bowen*, Y. & C. 244.
12. (*Younger son—Shifting clause.*) Under the will set forth in the case of *Scarisbrick v. Eccleston*, L. M. No. 50, the following point, not decided by the House of Lords, arose in the Chancery of Lancaster. The eldest son, Thomas, had during his life-time continued in possession of estate C., which was devised in the first instance to Charles, with a proviso, that if Charles came as he did into possession of estate B., and there was any younger son in existence, it should go to him. Upon a suit for account brought by Charles against the executors of Thomas, it was decided on appeal by the Chancellor of the Duchy, reversing the decision of the Vice-Chancellor, that *younger* must be taken in its natural sense, and not as contended for by the defendants, in the sense of posterior in limitation.—*Scarisbrick v. Lord Skelmersdale*, Y. & C. 78.

BANKRUPTCY.

[Containing Montagu, Deacon, and De Gex, Vol. 1, Part 3.]

ACT OF BANKRUPTCY.

1. (*Absence of bankrupt.*) A negotiation having been entered into between bankrupt and his creditors, as to whether he should execute an assignment or a deed of composition, his solicitor concurred with one of the creditors in calling a meeting at the bankrupt's house, for the purpose of hearing a statement of his affairs; at this meeting the solicitor attended but not the bankrupt; held that his absence was an act of bankruptcy.—*Exp. and re Beer*, 390.
2. (*Dealings with bankrupt.*) The 2 & 3 Vict. c. 25, which gives validity to *bond fide* dealings with bankrupts prior to the date of the commission, though subsequent to the act of bankruptcy, does not apply to a case where the assignees were appointed before the passing of the act.—*Exp. Varnish, re Burghart*, 514.
3. (*Delay in payment—Acquiescence of creditor.*) After affidavit of debt filed under 1 & 2 Vict. c. 110, s. 8, the creditor entered into a treaty for compromising the debt, the terms of which treaty were agreed to and the deed containing them signed by the bankrupt, and this deed being presented to the creditor for signature after the twenty-one days, he expressed his willingness to sign if the provisions of the deed for his benefit and for that of his nephew, who was a partner of the bankrupt, were previously executed; this was not consented to, and the treaty was broken off: Held, that the creditor could not set up the twenty-one days' delay in payment as an act of bankruptcy; another reason was, that the affidavit of debt was not filed *bond fide* with the view of making the debtor a bankrupt, but in order to compel a dissolution of partnership upon terms favourable to creditor's nephew.—*Exp. and re Budd*, 436.

ANNUITY.

1. (*Valuation.*) The provision of 6 G. 4, c. 16, s. 54, under which an annuity proved for under a bankruptcy is to be valued with reference to the price paid for it, held to apply to an annuity for term of years granted by bankrupt in exchange for a goodwill, but how that provision was to be applied was left for the commissioners to settle, the order being made in the ordinary form.—*Exp. Scholes, re Jemmett*, 384.
2. (*Valuation—Premiums on policy.*) Where it was the opinion of the Court, upon the construction of the annuity deed, that it was optional with the annuitant to insure or not, it was held that the value of the policies, which he did in fact effect on the life of the bankrupt grantor, was not to be taken into account, as an item of deduction, in valuing the annuity under the bankruptcy, and the Court set aside the valuation of the commissioners, which appeared to be made upon that footing, though it was not so stated, and took a mean between the valuations of two actuaries.—*Exp. Varnish, re Burghart*, 514.

ANNULLING.

1. (*Concert.*) A fiat issued upon a concerted act of bankruptcy is not necessarily void, and the Court sustained such a fiat against the petition of a creditor, where the assignees, who were not privy to the concert, wished to proceed with the fiat, and another act of bankruptcy not concerted was proved. *Exp. Bostock, re Whitehead*, 344.
2. (*Concert—Fraud.*) Though concert is not by itself a conclusive reason for annulling a fiat, yet where a fiat appeared to have been concerted only for the benefit of the bankrupt, and with a fraudulent intent, one of the circumstances being a misdescription for the purpose of keeping creditors in ignorance of the proceedings, it was annulled.—*Exp. Lewis, re Stanley*, 365.

APPARENT OWNERSHIP.

- (*Partnership property*). A. and B. agree to dissolve partnership, and publish a notice in the Gazette to that effect, and also stating, that the debts due to and by the old firm would be received and paid by A.; no assignment is executed of the partnership effects to A., who continues to carry on the business on his own account, but under the partnership firm: Held, upon a joint fiat issued against A. and B., that the partnership property belonged to the joint estate, and not to the separate estate of A.—*Exp. Cooper, re Dawson*, 358.

BANKRUPT.

1. (*Account against assignees—Laches—Real and personal estate.*) In the case of a commission issued seventeen years ago, and under which there had been no dealings with the personal estate for the last fifteen years, but one of the assignees had been in possession of the real estate till his death, a few months before the petition, an account was refused to the bankrupt as to the personalty, but given to the real estate against the surviving assignee.—*Exp. and re Newhouse*, 508.
2. (*Account—Probable surplus.*) A certificated bankrupt is entitled to an account against the assignees upon shewing only a probability or a surplus. The statement in the petition here was, that there would be enough, if properly got in, to pay twenty shillings in the pound.—*Exp. and re Mulachy*, 353.

BILL OF EXCHANGE. See PARTNERSHIP.

CHARGE.

1. (*Building agreement—further advances.*) Testator had, according to his usual course of dealing with the bankrupts, sold them land, allowing the purchase money to remain as a charge, and made them advances for the purpose of building, such advances as well as the purchase money being stated in a written memorandum to be a charge upon the land. The executors and devisees in trust of the testator, being authorised by the will to continue the same course of dealing, sold other land to the bankrupts, leaving the purchase money unpaid, and made advances to them for the purpose of building, without taking any memorandum: Held, these latter advances, as well as those made by the testator, and the purchase money in each case were a charge upon the lands. All claim to costs as to the claim of the executor was waived by them.—*Exp. Linden, re Baker*, 423.
2. (*Extension of charge.*) The bankrupt, after mortgaging by deposit an equity of redemption, and also his undivided share as a tenant in common of other property, the charge being further supported by a letter referring to the deposit,

afterwards paid off the mortgage as to one property, and upon a partition made of the other, obtained something more than his share, paying 100*l.* forequality of partition: Held, that the charge attached to the exonerated property, and also to the share assigned in severally, free, as to the latter, from any claim in the assignees in respect of the 100*l.*—*Exp. Bisdee, re Baker*, 333.

And see LIEN; PUBLICAN'S LEASE.

CONSTRUCTION OF STATUTES. See ACT OF BANKRUPTCY, 1, 2.

DEBTS BY SIMPLE CONTRACT.

(*Estate of traders.*) Under 11 G. 4 & 1 W. 4, c. 47, repealing and embodying Sir Samuel Romilly's act of 47 G. 3, c. 74, the estate of a trader is only chargeable with the simple contract debts in the hands of the heir or devisee, and a charge by way of deposit, created by the heirs before action brought, was held to have precedence of the debts.—*Exp. Baine, re Boden*, 492.

LIEN.

(*Lost by transfer of deed.*) A party having a lien on deeds for money advanced in exoneration of the property, held to have lost that lien by depositing those deeds as a security with another party.—S. C.

PARTNERSHIP.

(*Acceptance of bill by delegation of one partner.*) The bankrupts, who were executrix and executor, and carried on the testator's business for the benefit of his family, the management of the business being left for a time in the hands of one of the sons, came to an understanding with each other and with the drawers of the bills in question (between whom and the firm there had been a long course of dealing) by which it was settled that for the future, executor A. alone should accept all bills and manage the cash transactions. Afterwards, upon A.'s refusal to accept bills, the drawers prevailed upon the executrix, who was unable to write, to authorize her son to accept bills in her name, and bills were accordingly signed by him in her name "for self and executor." Upon the joint bankruptcy of executrix and A., proof which had been made on their bills by a bond *fide* holder was expunged on petition of the assignees, the case being distinguished from *Exp. Sutton, 2 Cox*, 84, by the fact that the delegation was not in the ordinary course of business, but contrary to the arrangement for carrying it on.

It was urged in support of the proof, that the bills had in each case been signed in the presence and by the direction of the executrix, and this not being proved, an issue was asked for by the holder, which was refused by the Chief Judge, though he appears in his judgment to consider the fact alleged to be material.—*Exp. Holdsworth, re Robinson*, 475.

And see PROOF, 1.

PETITIONING CREDITOR. See PRACTICE, 1.

PRACTICE.

- (*Affidavit.*) The rule that affidavits should be read before time is given to answer them, does not apply to affidavits in answer, but only to affidavits in reply.—*Exp. Holdsworth, re Robinson*, 309.
- (*Affidavit—Mistake.*) Leave given to issue second fiat in consequence of mistake in affidavit of debt.—*Exp. Hatton*, 309.
- (*Annulling.*) On petition to annul, the bankrupt is entitled to see the proceedings, though the assignees do not rely upon them but upon affidavit.—*Exp. Beer*, 390.

4. (*Annuling—Petitioning creditor.*) Petition to annul by the petitioning creditors on the ground that one of them was an infant, ordered to stand over in order to make the bankrupt a party, and to see what had been done under the fiat.—*Exp. Potts, re Ayre*, 331.
5. (*Contempt—Four-day order.*) In process for contempt it is proper to bring the evidence of disobedience, as of nonpayment, down to the latest period before the application is made, but the circumstance that the affidavit of demand and nonpayment had been made six days before the four-day order was applied for, was held no ground for discharging such order, when it was made eight years ago, and the petitioner had remained ever since in custody under it. Per Lord Chancellor.—*Exp. Green, re Elgie*, 464.
6. (*Costs—Discharge of bankrupt from arrest.*) Bankrupt having been arrested under a judge's order, made under 1 & 2 Vict. c. 110, s. 2, on an affidavit that he was about to leave the country, makes an application to the Court of Review for his discharge, which being consented to by petitioning creditor, he is discharged as upon such consent, but costs were not given, on the ground that if he had been improperly arrested, he ought to have applied for his discharge to the judge or the Court of law.—*Exp. and re Webber*, 464.
7. (*Evidence—Deposition—Notice.*) On petition by bankrupt to annul, affidavits of the other party, containing the particulars of bankrupt's examination before the commissioner, allowed to be read without further notice to the bankrupt of intention to read his deposition.—*Exp. and re Ely*, 357.
8. (*Joint and separate creditors.*) On petition of separate creditors to have an inspector appointed to inquire whether there was any joint estate, the order secured to the separate creditors the right of electing such inspector.—*Exp. Wilson, re Mauley*, 310.
9. (*Substitution of debt—Costs.*) Order for substitution of debt, by reason of the first being insufficient, or invalid, only made at the cost of the first petitioning creditor. Quere as to date of substituted debt, with reference to the date of the former one.—*Exp. Ullathorne, re Read*, 338.
10. (*Taxation of costs—Action for costs.*) The general rule is, that the order for taxation should provide for the costs of the taxation.
Where the writ of summons in an action for costs, though sued out before the petition, was not served till after: Held, that the solicitor was not entitled to judgment of the term, but that the petitioner must pay the costs of the action up to the petition.—*Exp. Randall, re Shirley*, 341.
11. (*Transfer of fiat.*) The Court refused to transfer one of two fiats to the commissioner, before whom the other was worked, on the application of the petitioning creditor alone, grounded on the accounts of the two estates being intermingled.—*Re Hamilton*, 312.

PROOF.

1. (*Joint and separate estate.*) Where after a dissolution of partnership, a separate fiat was issued against one of the two partners, under which a joint creditor proved his debt; the Court, on the petition of the assignee, ordered an inquiry as to whether there was any joint estate, and in the meanwhile stayed payment of dividend.—*Exp. Birley, re Krauss*, 387.
2. (*Laches—Opening dividend.*) Where a creditor, through the neglect of the solicitor to act upon his instructions, had omitted to prove his debt till a dividend

was in course of payment, the Court refused him leave to do so, so as to interfere with the amount of dividends.—*Exp. M'Cheane*, 329.

3. (*Security—Waiver.*) *Semble*, that a creditor of three partners having obtained from them a security on the estate of two of them, cannot prove for the whole, without giving up his security, any more than he could if he had a lien on the property of the three; but the case was decided on the ground that he had previously obtained an order for sale with liberty to move for the balance, and upon the authority of *Rome v. Young*, 4 Younge & Coll. 204. See *Equity Dig. supra.*—*Exp. Davenport, re Bunton*, 313.
4. (*Transfer of fiat.*) Where the proceedings under two separate fiats had been ordered to be transferred and incorporated with those under a joint fiat subsequently taken out: Held, that the commissioners must admit the proofs as they stood under the separate fiats, and had no right to deduct from the amount upon which future dividends were to be declared, any dividend received before the transfer, but that it was open to any creditor to impeach a proof made under the separate fiats.—*Exp. Bateson, re Haddon*, 500.

PUBLICAN'S LEASE.

(*Brewer's lien.*) A publican purchases a valuable lease, which, immediately upon its execution, is delivered to the solicitor of the brewers, who had advanced money for the purchase, and on the same day the publican signs a memorandum stating that he had deposited the lease as a security for £1000, "now lent and advanced by them to me;" it turns out that the publican was an uncertificated bankrupt, and the property having been first sold under an agreement between the brewers and the assignees that the sale should not vary the rights of the parties, the assignees bring their action for the money produced by the sale, which had been paid to the brewers, whereupon the latter file their bill for an injunction and to establish their equity, stating that the deposit of the lease was according to the usual practice of the trade, made in pursuance of an agreement made previous to the purchase. The common injunction having been first obtained was continued on motion to dissolve by the Vice Chancellor and his decision affirmed by the Lord Chancellor, the question being still left open whether the brewers would be able at the hearing to establish their equity. The money was ordered by the Lord Chancellor, as of course, to be paid into Court.—*Mear v. Smith*, 396.

SOLICITOR AND CLIENT.

1. (*Taxation—Lapse of time.*) On application of administratrix of petitioning creditor, order made for retaxation of the solicitor's bill, although nearly six years had elapsed from its being taxed in the lifetime of the petitioning creditor, but it had not been presented to the administratrix for payment until shortly before the petition.—*Exp. Billington*, 375.
2. (*Taxation—Negligence.*) *Semble*, that the court will not on an order for taxation direct an inquiry as to the negligence of solicitor, unless the bill be relied on as constituting a good petitioning creditor's debt.—*S. C.*

TRUST.

(*Construction of will—Vesting of legacy.*) Where a testator gave £2000 charged upon land to his daughter, with a direction that she should let it remain in the hands of his executors (who were his sons), at the interest of four per cent. till she married, and some time after, the executors, who succeeded to the business

of the testator, died, and their sons, who next succeeded to the business, and one of whom succeeded to the estate upon which the legacy was charged, became bankrupt: Held, that the daughter, though not married, was entitled to have the legacy raised out of the estate.—*Exp. Forster*, 418.

TRUSTEE.

(*Proof for trust money.*) Where bankrupt trustee has sold out stock, the cestui que trust may either prove for the price or for the value at the time of the bankruptcy.—*Exp. Gurner, re Iveson*, 497.

ECCLESIASTICAL.

[Containing Cases in 2 Curteis, Part 1.]

ADULTERY.

1. (*Condonation—Previous adultery.*) Adultery in the husband, which has been condoned, is no bar to his obtaining a decree for separation, and the effect of condonation is not avoided by the fact of the husband having committed a previous adultery with another person, of which the wife at the time of the condonation knew nothing.—*Anichini v. Anichini*, 210. (Consist.)
2. (*Evidence—Letters.*) Letters containing high flown expressions of attachment, coupled with the equivocal conduct in the parties, and with concealment of visits from the husband: Held sufficient proof of adultery.—*Grant v. Grant*, 16. (Archea.)

BURIAL FEES.

1. (*Jurisdiction.*) *Semble*, that the jurisdiction of the Ecclesiastical Courts is confined to the ancient and customary burial fees, and does not apply to fees payable under a local act of parliament.—*Spry v. The Directors and Guardians of Marylebone*, 5. (Consist.)
2. (*Jurisdiction—Chancellor of Diocese.*) He has no power of establishing new fees for common burials.—*S. C.*
3. (*Local act.*) Where a case of ancient and immemorial fees was not even alleged by the libel, but usage only for a hundred years was pretended, and a local act relied on, under which the vestrymen had power to fix the rate of fees for a new burial ground, provided that they should not fix them at a less rate than was payable in the old burial ground, and the vestry had not exercised the power, the libel was rejected.—*S. C.*

CHURCH RATE.

1. (*Excess—Estimate.*) In a suit for subtraction of a church rate of 9d. in the pound, an allegation, that the churchwardens had in the first instance produced an estimate requiring a rate of 6d. in the pound and proposed such a rate accordingly, when a 9d. per pound rate was proposed and carried as an amendment, was admitted as a *prima facie* defence to a suit for the rate; but the excess beyond the estimate was afterwards explained, and the assessment held valid.—*Smith v. Dixon*, 264. (Consist.)

2. (*Expense of consecration*). A church-rate for defraying the expense of consecrating a church rebuilt under the stat. 59 G. 3, c. 134, s. 40, held good, though no faculty was granted for the rebuilding.—*Warner v. Gater*, 315. (Archb.)
3. (*Inequality*.) Although the proper practice is to rate all, and then to excuse such as are too poor, yet the Court, upon the question of the admissibility of an allegation, held that small omissions did not invalidate a church rate.—*Smith v. Dixon*, 264. (Consist.)

And see COSTS.

CHURCHWARDEN.

- (*Church-rate—Opposition*.) Where at a vestry called for making a church-rate the following resolution was proposed and carried, "That this meeting, considering church-rates at all times bad in principle and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called, till this day twelvemonth," and one of the churchwardens voted for this resolution: Held, that he was not guilty, in so doing, of an ecclesiastical offence, it not being averred that the church, in consequence of the refusal of the rate, was still out of repair.—*Cooper v. Wickham*, 303. (Archb.)

COSTS.

- (*Unnecessary plea*.) A party who had successfully resisted a demand for church-rates, but who had put matters in plea which were not necessary to his defence, and to which the churchwardens, it seemed, had a good answer, was not allowed his full costs, but only 40% *nomine expensarum*.—*Chesterton v. Forlar*, 77. (Archb.)

DIVORCE.

- (*Cruelty—Children*.) On a suit for divorce by reason of cruelty, the Court has no discretion to exclude the testimony of the children, if produced by either party. The objection relied on in this case was their tender age, and the length of time since the facts which they had witnessed.—*Lockwood v. Lockwood*, 281. (Consist.)

EVIDENCE.

- (*De bene esse*.) Where evidence had been taken *de bene esse*, by reason of the ill health of witness, the Court would not receive it at the hearing without an affidavit that the witness was still incapable of being examined.—*Weguelin v. Weguelin*, 263. (Consist.)

And see DIVORCE; EXECUTOR, 1; WILL.

EXECUTOR.

1. (*Competency of witnesses—Renunciation—Assignment*.) An executor, to whom one-third of the residue of real and personal estate was devised and bequeathed as executor, after being sworn under a commission, renounced his executorship on the 21st November (but the proxy of renunciation was not recorded till the 3rd of December), and by lease and release of the 21st and 22d November conveyed and assigned all his interest to one of his co-executors:—Held, that he was a competent witness in support of the will, the renunciation being sufficient to divest him of interest, even though the assignment of the legacy might be void, and the assignment not being an act of executorship, because the proxy had relation to the renunciation, which was prior to the assignment.

Other acts of intermeddling being subsequently shown against executor, the

Court said that if they had been brought forward at the proper time, he would not have been allowed to renounce.—*Munday v. Slaughter*, 72. (Prerog.)

2. (*Intermeddling—Renunciation.*) A person appointed executor, and doing acts which at law would constitute him executor de son tort, may be compelled to take probate; but in this case the party having shown that he had acted only as the agent of the other executor, and had never claimed a legacy given to him as executor, was excused.—*Rayner v. Green*, 248. (Prerog.)

FOREIGNER.

1. (*Intestacy—Right to administration.*) The principle of law, that the goods of a foreigner dying in this country, without having acquired a domicile here, are distributable according to the law of the country of his domicile, applies only to the distribution of his estate, and not to the administration or possession of it until the right claimants come forward. Accordingly in such a case, administration of the effects of a citizen of the United States, limited for the purpose of paying his debts, and transmitting the balance to the treasury of the United States, was refused to the American consul.—*Aspinwall v. The Queen's Proctor*, 241. (Prerog.)
2. (*Property in this country.*) The deceased, a Spaniard, died domiciled in Spain, leaving 10,000*l.* in this country: pending a suit at Cadiz as to the validity of his will, a judicial administrator was appointed there, with a power to pay a moiety of the property in a particular manner. The Court here, the order of the Court at Cadiz appearing reasonable, granted administration to the attorney of the administrator, limited to the 10,000*l.*—*Vicars v. D'Arumbeau*, 277. (Prerog.)

MARRIAGE.

- (*Between Englishmen and foreigners.*) The act 4 G. 4, c. 91, applies to marriages where one party is a foreigner, and accordingly a marriage at the British embassy at Paris, between an Englishman and a French woman, was held good, though it seemed that it would have been void under the French law, from the nonconsent of parents.—*Lloyd v. Petitjean*, 251. (Consist.)

PARISH. See PARTIES.

PARTIES.

- (*Guardian of poor.*) *Quære*, whether the directors and guardians of the poor of a place may in the absence of any special act be sued in the name of their clerk.—*Spry v. The Directors and Guardians of Marylebone*, 5. (Consist.)

SOLICITOR.

- (*Privileged communication.*) Communications from a party to his solicitor, with reference to a suit for a divorce then pending, held privileged in the Ecclesiastical Court.—*Lloyd v. Lloyd*, 262. (Consist.)

WILL.

1. (*Domicile—Foreign court.*) An officer in the East India Company's service having come from India to the Cape of Good Hope for temporary purposes, dies there, having made an unattested will, which is admitted to probate at the Cape; the Court allowed probate here, without saying whether it did so as upon a judgment of a foreign Court, or because it thought the domicile to be in India, as to which *quære*, (and see *infra*, 8).—*In the goods of Foy*, 325. (Prerog.)

2. (*Erasure.*) Certain parts of a will being obliterated so as to be illegible, probate granted, leaving them out.—*In the goods of Ibbetson*, 337. (Prerog.)
3. (*Erasure—Alteration.*) Testator having after due execution substituted the word "thirty" for "fifty" in a legacy of fifty pounds, the alteration being unattested; probate was granted, leaving out the legacy. *In the goods of Rip-pin*, 337. (Prerog.)
4. (*Erasure—Restoration.*) In a will made before the 1st of January, 1838, testator after that day erased certain words and inserted others, and wrote on the will an unattested memorandum, stating what the words erased where; motion for probate of the will as it originally stood refused.—*In the goods of Brooke*, 343. (Prerog.)
5. (*Execution—Presence of witness.*) Where one of the witnesses being in the same room with the testator, who was in bed, could not actually see him sign, nor could the testator see him attest, the bed curtains being in the way: Held, nevertheless that the execution was good.—*Newton v. Clarke*, 320. (Prerog.)
6. (*Execution—1 Vict. c. 26.*) An unattested codicil, without a date, where the will to which it seemed to refer, and to which it was propounded as a codicil, was dated in 1830, and where the testator died in 1839, was presumed to have been executed before the 1st of January, 1838.—*Pechell v. Jenkinson*, 273. (Prerog.)
7. (*Holograph paper—Cancellation.*) A paper being propounded which was alleged to be an holograph of and signed by the deceased, and to have been sent to one of the legatees named in it in an anonymous note by the threepenny post, leaving legacies amounting to £10,000, and referring to a legacy in another codicil not forthcoming, (there being traces in the evidence of other testamentary papers which were not forthcoming,) partially torn and partially burnt, as was alleged to have been done to this and other testamentary papers since the death of the testator, or in his life time without his knowledge, the evidence as to the handwriting being contradictory, though the affirmative greatly preponderated, and the disposition being probable; the Court holding that, independently of the burning and tearing, there was not sufficient ground to establish it, rejected it without an inquiry as to whether it had been cancelled or not.—*Wood v. Goodlake*, 82. (Prerog.)
8. (*India—Presumption.*) Probate allowed of the will of an officer in her Majesty's service executed in India, attested by two witnesses, but without a full attestation clause.—*In the goods of Johnson*, 341. (Prerog.)
9. (*Instructions—Imperfect reference.*) Two papers A. and B. wafered together and sealed up in an envelope, indorsed "The will of James Wood, 2d and 3d December, 1834," were propounded as a will. Paper A. which was headed "Instructions for the will of me James Wood," and was dated the 2nd of December, and signed by the testator but not attested, purported to appoint four gentlemen by name executors, whom he desired to take possession of his personal estate, subject to the payment of his debts and to such legacies as he should thereafter direct, and the paper went on to declare that he would dispose of his real estates by writing indorsed thereon. Paper B., dated 3d of December, signed by the deceased and attested by three witnesses, began "I James Wood do declare this to be my will for disposing my estate as directed by my instruction," and gave all his real and personal estates "which he

might not dispose of," and subject to his debts and to any legacies or bequests which he might thereafter make, to "his executors," not naming or describing them. Both papers were in the handwriting of one of the executors, the attorney of the deceased, and it appeared in evidence that they had been annexed together, sealed up in an envelope, indorsed and deposited in testator's bureau, by such attorney during the last illness of the testator, and without his directions or knowledge: Held, that the Court could not look to paper A. to explain paper B., the reference not being sufficiently certain, and the general rule applying that instructions are superseded by the will, and the Court pronounced against A. without making any decree as to B. and condemned the parties propounding the two together in the costs of one of the next of kin.—*Wood v. Goodlake*, 82.

10. (*Power—Probate.*) Will appointing executors, and disposing of property under a power, being open to question by reason of a legacy given to one of the witnesses, admitted to probate, leaving it to the Court of Equity to decide whether it was a good execution of the power.—*In the goods of Biggar*, 336. (Prerog.)
11. (*Power—Publication.*) A power to dispose of personalty by will, "to be signed and published by donee in the presence of and to be attested by two or more credible witnesses," is not duly exercised by an instrument signed and sealed in the presence of two witnesses, the attestation clause being "witnesses to the execution hereof," and parol evidence of publication not being admissible. *Spilsbury v. Burdett* referred to. Since reversed in Exchequer Chamber, 9 Ad. & Ell. 936.—*George v. Rielly*, 1. (Prerog.)
12. (*Same.*) The same point was decided as in last case, as to the insufficiency of the execution by reason of the want of publication, but the terms of the power in this case, not requiring the will to be attested, but only to be signed and published in the presence of two witnesses, parol evidence of publication was held admissible, but the evidence relied on was not sufficient.—*Walters v. Metford*, 221. (Prerog.)
13. (*Preparation—Interested parties.*) Although it is not the rule of the Ecclesiastical Court, and, as Sir H. Jenner says, it never was the rule, that they will not admit to probate a will prepared by a party taking an interest under it, unless it be shown either to have been drawn up from instructions or read over to the testator, yet proof of bare execution is not sufficient in such a case; and some proof will be required, varying according to the capacity of the testator and his habits of life, that he knew the effect of the instrument, and the extent of the property which passed by it.—*Durling v. Loreland*, 225. (Prerog.)
14. (*Seaman—Purser.*) Purser of a man of war held entitled to the benefit of the exemption given by 1 Vict. c. 26, s. 11, as to the wills of mariners or seamen made at sea.—*In the goods of Hayes*, 338. (Prerog.)
15. (*Signature.*) The following, being the concluding words of a will, "signed and sealed as and for the will of me, C. E. T. in the presence of us," held to be a sufficient signature, the will being on the same day acknowledged as a will to the attesting witnesses.—*In the goods of Woodington*, 324. (Prerog.)
16. (*Signature by another.*) Testator being too ill to sign, requested another person, who had drawn the will, to sign it for him. This he did in his own name, as on behalf and by direction of testator. Held good.—*In the goods of Clark*, 329. (Prerog.)

17. (*Signature by mark.*) Will signed by a mark, and not containing in it the name of the testatrix, held good, being identified aliunde as the will.—*In the goods of Bryce*, 324. (Prerog.)
18. (*Signature—Acknowledgment.*) When after the signing of the will testatrix sent for two persons to attest it, and upon their arrival the person who had drawn the will produced it, and said that these two (who were then present) had come to witness her will, and she then said "I am glad of it, thank God," held to be a sufficient acknowledgment of signature under 1 Vict. c. 26.—*In the goods of Warden*, 334. (Prerog.)
19. (*Same.*) Testatrix having signed her will, not in the presence of the subscribing witnesses, afterwards on producing it to them said "Sign your names to this paper:"—Held not to be an acknowledgment of signature under 1 Vict. c. 26.—*In the goods of Rawlins*, 326. (Prerog.)
20. (*Same.*) Deceased having signed her will in the presence of one witness, who then attested it, on a subsequent day acknowledged the will in the presence of that witness and of another, who then subscribed the will, the former witness not subscribing again, probate refused.—*In the goods of Allen*, 331. (Prerog.)
21. (*Unattested addition.*) In a will made since the statute 1 Vict. c. 26, a clause appointing executors, coming after the signature and attestation, rejected, and administration with the will annexed granted to next of kin.—*In the goods of Howell*, 342. (Prerog.)

PRIVY COUNCIL.

[Containing cases in 2 Moore, Part 1.]

APPEAL.

1. (*Costs.*) Decree affirmed with costs, though varied in minor points improperly made the subject of appeal, and which might have been set right by the Court below, if applied to.—*Stratton v. Symon*, 125.
2. (*Limitation of time—11th rule, sec. 25.*) The above rule of the Orders in Council of 20th June, 1831, as to the allowance of appeals to the Privy Council by the Courts of British Guiana, Trinidad, and St. Lucia, if the security to be given by the appellant is completed within three months of the date of his petition for leave to appeal, was held to be prohibitory in its effect, and binding upon those Courts, and not capable of being waived by the appearance of the Respondent, their Lordships however, on petition being presented to them at their suggestion for leave to appeal, advised the allowance of the appeal.—*Retemeyer v. Obermuller*, 93.

And see JERSEY.

FRENCH LAW.

- (*Nuptial Contract.*) The claim of the son against his father's estate to a legacy given him by his mother's will, and which he contended was charged upon his father's property by virtue of the marriage contract, under which his mother's personal property had been paid over to the father, upon terms excluding com-

munauté de biens and converting money into land, was rejected on appeal, chiefly because there was no proof that the land of the father, against which the claim was made, was purchased with the mother's fortune.—*Smith v. Brown*, 35.

JERSEY.

(*Law of—Repudiation of succession—Appeal.*) Where a party had repudiated the succession before the sheriff, and an act founded on that repudiation had been in his presence recorded in the Royal Court, he was not allowed to appeal against that act, though he alleged that he never meant to repudiate the succession, but only to avoid his share in certain unnecessary expenses, and though it appeared the record contained error on the face of it, that being a matter for the Court below to set right if required.—*Le Feuvre v. Le Feuvre*, 70.

JURISDICTION.

(*Appeal—Monition—Proceeds of ship.*) Where after the assertion of an appeal against a decree of forfeiture in the Admiralty Court at Gibraltar, and an inhibition issued and served from the Judicial Committee, the Court at Gibraltar ordered sale of the ship, and it was sold accordingly, and a monition to transmit the proceeds issued from the Judicial Committee, the entire proceeds were required to be transmitted and not the balance after payment of costs and fees, although such costs and fees had been paid before the service of the monition; and upon a special return made, transmitting only the balance, an attachment was issued against the judge, registrar and marshal of the Court of Gibraltar.—*Barton v. The Queen*, 19.

And see ORDERS IN COUNCIL; SLAVE ABOLITION ACT, 3.

ORDERS IN COUNCIL.

(*Retrospective effect of new rules.*) A party who had only been provisionally released from *gyseling*, which was a qualified mode of attachment used in Berbice, was held liable, in respect of the same matter and the previous decree, to a new process for enforcing the sentences of the Court which had been established in that colony in pursuance of an order in council made subsequent to that provisional release.—*Retemeyer v. Obermuller*, 93.

RECORD. See JERSEY.

SLAVE ABOLITION ACT.

- (*Conviction—Penalties—Appeal.*) A conviction upon an indictment under this act does not disqualify a party from appealing against a sentence of the Vice Admiralty Court, for penalties under the same act and for the same offence.—*Sheerwill v. The King*, 1.
- (*Cumulative penalties.*) The penalties under this act for shipping and receiving goods on board to be used in the slave trade are not cumulative, and one penalty only can be recovered under s. 10, from the parties concerned in the offence.—*Del Campo v. The Queen*, 15.
- (*Jurisdiction—Foreign subject.*) Held that the owner of a vessel, though a subject of the Queen of Spain, bringing his vessel to a British port, was liable personally to the penalties under the 10th section of the above, as well as his vessel to seizure.—*S. C.*
- (*Onus probandi.*) The burden of proof of guilty knowledge against the owners or masters of ships, lies upon the seizers, the immunities given by the 46th sec.

tion being only for their protection against actions where there was a probable cause of seizure.—*Barton v. The Queen*, 19.

5. (*Same point—Suspicion.*) The same point was decided the same way in favour of a person who had shipped goods under circumstances of great suspicion, but who swore positively that he had no knowledge whatever of the ship being about to be dispatched on a slave voyage.—*Sheerwill v. The King*, 1.

VENDOR AND PURCHASER.

(*Interest on purchase money.*) Under an agreement for the payment of the purchase money by yearly instalments, the four last of which were to be retained by purchaser as an indemnity till a good title should be vested in him, the purchaser, who was originally tenant, continuing all the while in possession: Held, that the vendor was not entitled to compound interest on the four instalments which were retained.—*Stratton v. Symon*, 125.

WEST INDIA ESTATE.

(*Manager and Trustee.*) Where the attorney and manager of an estate, held in undivided moieties by tenants in common, was also co-trustee of one moiety, an injunction obtained against him by the cestui que trust of such moiety, restraining him from consigning any portion of the produce except as such cestui que trust should direct, was dissolved on appeal.—*Israell v. Rodon*, 43.

WILL.

1. (*Holograph—Instructions.*) A holograph paper found concealed in the bedstead where testator slept, beginning "head of instructions to my solicitor J. Lee to add to my will the following codicil;" and concluding, "this is my last will and testament," and then signed, containing various legacies to a large amount to persons described by the initial letters of their names, the testator having lived four months afterwards, when he died suddenly through accident; admitted to probate, there being evidence that the testator had spoken of some testamentary paper which would be found after his death, and of his having often during the four months talked of going to Mr. Lee, his solicitor, and having made two appointments to go there, (with important papers) one of which he put off and the other was prevented by accident.—*Castle v. Torre*, 133.
2. (*Probate by consent.*) Probate granted by consent without fraud will not be revoked, on the ground that the conditions on which the consent was given have not been fulfilled.—*Nicol v. Askew*, 88.
3. (*Probate—Want of.*) *Semble*, that the Court will not adjudicate upon a will, not established in a Court of probate, though registered in the colony, and not questioned in the Court below.—*Moss v. Leatham*, 73.
4. (*Revocation—Marriage and birth.*) Since the decision in *Marston v. Roe*, 8 Adol. & El. the revocation of a will by marriage and birth of child is to be put on the footing not of presumed intention, but of a tacit condition attached to the will, and taking effect when the circumstance happens; a principle which would exclude that sort of evidence that the Ecclesiastical Courts in particular have been used to admit, as to the intention of the testator.

But in this case, in which it was sought to exclude the revocation by the fact of a settlement of part of the property having been made upon the marriage, giving a provision to the wife and children, the Court thought that even upon the footing of presumed intention, the presumption of revocation was not rebutted.—*Israell v. Rodon*, 51.

HOUSE OF LORDS.

[Containing Clark & Finnely, Vol. 6, Part 1; and West, Vol. 1, Parts 1 and 2.]

ACCOUNT.

(*Interest—Annual rests.*) Where A. having sold an estate of B. which had been conveyed to him in mortgage, and having paid himself the mortgage debt and other debts due to other parties out of the proceeds, retained the rest in his own hands (by consent of the other creditors of B.) as a security against any demands that might be made against him as surety of B., without any stipulation as to the amount of interest he should pay, A. being also executor of B.:—Held, that he was liable to 5*l.* per cent. interest; partly because, if it had been paid into Court, as the creditors might have required, it would have realized 4*l.* per cent., which, with yearly or half-yearly rests, would have been about equal to 5*l.* per cent.; partly because there had been an agreement charging him with 5*l.* per cent. on a balance previously retained out of the proceeds, after payment of his mortgage debt and before payment of some other debts;—the creditors, by their bill, sought to charge A. with 5*l.* per cent., and also to take the account with annual rests.—*Court v. Roberts*, C. & F. 65.

ADMISSION. See EVIDENCE.

ANNUITY. See EXPECTANT HEIR.

AGREEMENT.

(*Family arrangement—Consideration—Mutuality.*) The heir presumptive of a person who was then supposed to be a lunatic, being afraid that the lunatic might be induced to leave his estate to strangers, and not having himself the means of meeting the expenses of a commission, agrees with his son that the latter shall take out and prosecute a commission at his own expense, but in the name of the father, and should also carry on such other suits and proceedings as might be necessary; and in consideration of his so doing, and also of natural love and affection, covenants to settle the estate of the lunatic, in the event of its devolving upon him, to the same uses upon which another estate in the family was then settled, and according to which only a life interest was reserved to himself.

The son accordingly took out and carried a commission of lunacy against the lunatic (as he was found to be), who soon afterwards dies, whereupon the estate comes to the father: the son then files a bill for performance of agreement, which was decreed, though resisted on the ground of maintenance; want of mutuality, as the son could not be sued under it; illegality, as being a tampering with the great seal; and insufficiency of consideration, which latter objection, the only one on which the House laid much stress, was overruled on

the ground of its being a family arrangement, and because it seemed, on looking to the ages of the several parties, that the son had a greater chance of succeeding to the estate of the lunatic than the father.

The defendant also endeavoured to set up other objections, not raised by the pleadings, and resting upon facts incidentally brought out and to which the attention of the plaintiff had not been directed, as to which see observations of Lord Chancellor.—*Perse v. Perse*, W. 110.

ASSESSED TAXES.

1. (*Bond of surety—Construction.*) Payment of money received by a collector for a given year, to the unsettled account of a former year, is a breach of the condition of the bond for due payment.—*Gwynne v. Burnell*, W. 342.
2. (*Liability of collector's surety.*) It was the opinion of all the judges but one, that the commissioners of taxes could not proceed against the collector's surety upon his bond, until they had first applied all such property of the collector himself of which they had any knowledge; but there was much difference of opinion among the judges, and the point was not decided by the House of Lords, as to whether the existence of any unrealized property of the collector was a good ground of defence for the surety, without also showing that the commissioners knew of it. The decision upon appeal turned upon the state of the pleadings.—*S. C.*

ASSIGNEE. See EXPECTANT HEIR.

BANK OF ENGLAND.

(*Exclusive privileges—Bills of exchange.*) The decision of the Master of the Rolls in the case of the Bank of England v. Booth, 2 Keen, 466, to the effect that bills of less than three months, drawn by a bank in Canada upon "G. P., manager at the London Joint Stock Bank," under an agreement between the two banks that the latter should be answerable for bills of a less period than six months, was a violation of the privileges of the Bank of England under 5 & 4 W. 4, c. 98, was affirmed with costs, eleven of the judges being present and concurring; and it was held that it made no difference whether the London Joint Stock Bank, at the time of accepting the bills, had or had not monies of the Canada Bank in their hands.—*Booth v. The Bank of England*, W. 292.

CHARGE.

(*Jointure—Power—Priority.*) *Semble*, that where under a settlement A. was tenant for life, with remainder to trustees to raise an annuity by way of jointure to his wife, and with a power to charge 1000*l.*, the charge made under the power was prior to the jointure.—*Simpson v. O'Sullivan*, W. 332.

CITY OF LONDON.

(*Election of alderman.*) A custom of the city of London (supported by sufficient evidence), that where the inhabitants of any ward shall three times elect and return to the Court of the Lord Mayor and Aldermen the same person as alderman, and that Court shall three times reject him as unfit, the mayor and aldermen may then themselves elect an alderman for such ward, held to be good in law, and not to have been abrogated by the act of 11 G. 1, c. 18, which enacts that the right of electing aldermen shall belong to freemen of the city, being householders of the wards, and to none other whatsoever; nor by a bye law of 13 Anne, enacting that from thenceforth, in all elections of aldermen at the wardmotes, there should be elected only one able and sufficient

citizen or freeman, to be returned to the Court of Mayor and Aldermen, which person so elected shall be *by them admitted into office*, the object of this bye law and of the above statute appearing to have been to declare and regulate the right of election, but not to interfere with the right of approval.—*The King v. Johnson*, C. & F. 41.

CONSTRUCTION.

(*Irish Absentees Act*—"Honours.") The 28 Hen. 8, c. 3, called the Absentees Act, which, in order to remedy the mischiefs of absenteeism, vested in the crown of England "all honours, manors, castles, seignories, jurisdictions, and all other possessions and hereditaments held by certain persons named, or by any person to their use, in Ireland."—Held, contrary to the opinion of Sir E. Coke and other judges, upon a reference from the crown upon the case of claimant's ancestor, that the titles held by these persons were not taken away by the act.—*Earl of Waterford's claim*, C. & F. 133.

DECREE.

(*For an inquiry only*.) Although it is unusual for a decree to be merely for inquiry, yet such a decree may be proper; and an appeal against such a decree, made nine years back, by one who had been a party to the inquiry, of which the result had been on an appeal conclusively established against him, was rejected.—*Copland v. Toulmin*, W. 161.

DISMISSAL.

(*Leave to file fresh bill*.) The House of Lords, on dismissing a bill, refused leave to file a new one, because on looking to proceedings instituted in 1713 by parties having a like interest to the plaintiffs, it did not appear probable that the latter could, consistently with the facts, make a better case than they had made by the bill which was dismissed.—*Smyth v. Nangle*, W. 184.

DISCOVERY.

(*Parties to action*.) The right of discovery, in aid of a defence to an action at law, rests upon this, that the party against whom it is sought cannot at law be examined as a witness, and the right therefore exists only against the parties to the record. Upon this principle the demurrer of the Queen of Portugal to a bill, seeking discovery in aid of a defence to an action upon bills of exchange, brought by a person whom the bill stated to be only her agent, which demurrer had been overruled by the Court of Exchequer, was allowed on appeal, diss. Lord Wynford; the question of granting a commission to examine witnesses in Portugal being left open. The cases on the subject were commented on in the judgment, and those apparently on the other side explained.—*Queen of Portugal v. Glyn*, W. 258.

EVIDENCE.

(*Pleading—Admission*.) The Lord Chancellor stated it as his fixed rule of practice, not to admit evidence of admissions made by a party unless the bill stated not only the nature of the admissions generally, but the particular instance of conversation meant to be proved.—*Austin v. Chambers*, C. & F. 1.

EXPECTANT HEIR.

(*Rule as to sales by*.) The rule laid down by Sir W. Grant in the case of *Gowland v. De Faria*, 17 Ves. 20, as explained in *Headen v. Rosher*, 1 M'Clel. & Young, 89, and *Potts v. Curtis*, 1 You. 543, imposing upon the purchaser of the expectancy the burden of proving that he gave the proper value, does not

import that the value is to be calculated according to the tables, but that it must be the fair market value, with reference to the circumstances of the case. Accordingly a reference to the Master to inquire whether 6000*l.* and 10,000*l.* were respectively, under all the circumstances, the fair market value for two sums of 12,000*l.* and 20,000*l.* respectively, to be paid in the event of the heir surviving his father, under which reference it was found that this was the fair market value, was held right on appeal.

In the same case and as part of the same transaction it seemed, and on the day after the other deed was executed, the heir granted to his attorney an annuity of 200*l.* in consideration of his services; which annuity was five years afterwards sold to the purchaser of the post obits for 750*l.*; the heir also sought to set aside this annuity deed, but did not shew fraud: Held, affirming the decree of the Court below, that he could only do so upon payment of the 750*l.*—*Earl of Aldborough v. Trye*, W. 221.

EXTENT. See **PARTNERSHIP**, 1.

FRAUD.

(*Confirmation of void deeds.*) A deed by which a devisee, just come to his estate, conveyed to the manager and agent a portion of the property in discharge of all accounts, agreeing at the same time by letter to continue him as a manager at a salary of 200*l.*, though, as it seemed to the Court below and to the House clearly voidable if impeached at the proper time, was held validated by subsequent circumstances of confirmation, particularly, that shortly after its execution the legal advisers of the plaintiff, upon coming to a settlement of accounts on his behalf, for matters *since the death of the testator*, with the defendant the agent, had adverted to the deed and excepted the title deeds of the estate to which it referred from the number of those which according to the draft of a deed prepared by them were to be delivered up to the plaintiff, also that the plaintiff had once by letter to the defendant, and once in his defence to an action for costs by defendant, claimed the benefit of such deed. The bill however seeking to avoid the deed was both by the Court below and by the House dismissed without costs, and the letter as to the salary was ordered by the House to be given up to the plaintiff.—*Montmorency v. Devereux*, W. 64.

IRELAND.

(*Absence of register.*) The rule which requires births, deaths, and marriages, in the absence of living witnesses, to be proved by register, is not strictly applicable to Ireland, where such registers are either kept most irregularly or not kept at all, but after search made for register, other documents, such as copies of writings and evidence of reputation, are admissible.—*Earl of Roscommon's claim*, C. & F. 97.

And see **PLEADING** 1.

IRISH PEERAGE.

1. (*Evidence—Previous inquiry.*) On investigation of a claim to vote at the election of representative peers in Ireland, the minutes of proceedings and of evidence taken in an investigation of the same claim before the Irish House of Lords, including depositions taken under an order of that House, held admissible here (the witnesses being dead) not only against the crown but against a counter claimant (who had since come forward), who was not a party to the inquiry, but was cognizant of it.—*S. C.*

2. (*Irish Attorney General.*) It is the privilege as well as the duty of the Irish Attorney General to attend the House of Lords on the investigation of claims to Irish peerage, but he may, with leave of the House, depute counsel to attend for him.—S. C.

JURISDICTION.

- (*Court of error—Repleader.*) A Court of error has no jurisdiction to award a repleader.—*Gwynne v. Burnell*, W. 342.

MORTGAGE.

- (*Assignment of mortgage—Consideration.*) A. having a life interest in leaseholds and a power of charging them to the extent of 1000*l.*, afterwards assigned his interest and charged the 100*l.* by way of mortgage. A. was afterwards made a bankrupt, and the mortgagee's interest in the premises and the charge were sold, under an order of the Court in Ireland, to the appellant, for what was alleged to be a very inadequate price. After the death of A. the appellant filed his bill against his widow and his son, who was quasi heir in tail of the leasehold, to have the 1000*l.* raised, in which suit an inquiry was directed as to what was the real value of the interest and charge purchased by the plaintiff at the time of the purchase, which inquiry was on appeal declared to be irrelevant and improper.—*Simpson v. O'Sullivan*, W. 332.

PARTNERSHIP.

1. (*Assignment—Extent.*) A. and B. carrying on business in partnership, and being also members of a more extensive firm called C. and Co., assigned to other partners in that firm "a part of their stock in the concern to the amount of £1200 each," upon trust to pay two specified debts, with a resulting part for them A. and B., and duly intimated the assignment to the managing partner, who entered notices of it in the books, and the annual balance was struck accordingly. Upon extent afterwards issued at the suit of the crown against A. and B., held that the portions so assigned could not be taken.—*Spears v. The Lord Advocate*, C. & F. 180.
2. (*New and old firm.*) The decision in *Toulmin v. Copland*, 3 Y. & C. 625; L. M. No. 48, as to the application of monies received by the new firm in payment of debts of the old, affirmed on appeal.—W. 164.

PEERAGE.

1. (*Evidence—Writ of summons.*) It is a settled rule that where after a careful search no patent can be found, the writ of summons and the sitting under it is conclusive evidence of a peerage in fee.—*Barony of Braye*, W. 1.
2. (*Same—Banneret.*) Same doctrine held as in last case, and also that the use of the term *Banneret*, as applied to the ancestor in the writ, did not take the case out of the rule, the term *banneret*, if not synonymous with *baron*, being at any rate not inconsistent with it.—*Barony of Camoys*, W. 34.
3. (*Inquiry at the expense of the crown.*) A claimant to a peerage having made out a *prima facie* case, but being unable by reason of his poverty to go on with it, the Attorney General was ordered to take it up at the expense of the crown, but the House makes such orders reluctantly.—*Earl of Roscommon's claim*, C. & F. 97.

PLEADING.

1. (*Chancery—Pleading in Ireland.*) The House of Lords refused to entertain the notion, that the rules of pleading were less strictly followed in Ireland than in

England, and that therefore errors in Irish pleadings were to be treated with greater indulgence.—*Smyth v. Nangle*, W. 184.

2. (*Immaterial issue—Confession—Judgment non obstante.*) Defendant, who was surety of a tax collector, having pleaded, among other pleas to an action on the bond, that the collector had lands within the knowledge of the commissioners which they had not previously sold and applied, the commissioners replied that the collector had not any lands *within their knowledge*, to which defendant rejoined that the collector had lands, (saying nothing as to whether within knowledge of plaintiffs or not.) Upon this issue is joined and a verdict found for the defendant. Upon this judgment was given for the plaintiff, non obstante veredicto, by the Court of Common Pleas, and afterwards affirmed in the Exchequer Chamber. Upon appeal brought by the defendant, it was held, that, assuming the existence of land not within the knowledge of plaintiff to be a good defence, there was no confession upon the pleadings by the defendant, that the plaintiffs had not knowledge, and therefore that the judgment non obstante veredicto was wrong, and assuming that the existence of lands, whether within the knowledge or not, was a good defence, it was held, that the pleadings did not entitle the defendant to take advantage of a verdict given upon an issue irregularly joined, and the judgment therefore was simply reversed.—*Gwynne v. Burnell*, W. 542.
3. (*Irrelevant exception.*) Where the Master to whom it had been referred to take an account, after stating his opinion as to the manner in which he conceived certain monies, the subject of the account, ought to have been applied, stated that he had forborne to take the account till this point was decided, an exception alleging that he ought to have taken the account in a particular manner was held on appeal to be irrelevant and bad.—*Copland v. Toulmin*, W. 164.
4. (*Issue—Inconsistent with pleadings.*) Where the case of the plaintiff rested upon a covenant for perpetual renewal, supposed to have been contained in a deed of 1672, which had been destroyed, and which he stated in a particular form, which was admitted by the defendant, but he contended that it did not amount to a covenant for perpetual renewal, and the plaintiff by the prayer of his amended bill prayed that the said covenant might be declared to be a covenant for perpetual renewal, it was held on appeal by the House of Lords that this was a case of construction, and two issues granted by the Court of Chancery in Ireland, as to whether there was any agreement for a perpetual renewal, by distinct instrument, or any such covenant in the case besides that which had been set forth, were disallowed.—*Smith v. Nangle*, W. 184.

And see JURISDICTION.

PRACTICE.

(*Attendance of the judges.*) Although the judges have been summoned, and attend to assist, yet if the plaintiff in error makes no case, the House will give judgment without hearing the respondent.—*The King v. Johnson*, C. & F. 41.

And see TRIAL OF CAUSE.

SOLICITOR AND CLIENT.

(*Purchase by solicitor—Lapse of time.*) A solicitor, who was also a judgment creditor of his client, purchased an estate of the latter at a sale by the sheriff made at the instance of other creditors. Ten years afterwards the client filed his bill to have the purchase declared to be for his benefit, and a decree having been made in the Irish Court of Chancery, which the state of the pleadings did

not warrant, the House of Lords reversed that decree and remitted the cause, ordering issues to be directed as to whether the defendant was at the time of the sale in the relation of attorney or agent to the plaintiff, and whether he attended the sale in that character. The issues being found in the affirmative, a final decree was given in the Court below for the plaintiff.—*Austin v. Chambers*, C. & F. 1.

TITHE.

1. (*Onus probandi.*) Where the vicar established his right to small tithes generally, with the exception of some lands that appeared to have been part of the glebe, it was thrown upon the owners of other lands, though no receipt of tithes was shown against them, to prove a discharge.—*Clee v. Hall*, W. 148.
2. (*Setting aside agreement.*) In 1711 an agreement had been entered into between the rector and patron, (which was afterwards sanctioned by the Ordinary and established by decree in Chancery), by which the patron was to convey lands of the value of 130*l.* a year and a rent charge of 40*l.* in exchange for lands of 40*l.* a year conveyed to him by the rector, and an exemption from tithes to the amount of 56*l.* : the agreement was acted upon till 1822, when the rector, the respondent, refused to receive the rent charge, and filed his bill for an account against the occupiers, without offering to give up the land given in exchange : Held, on appeal, that even assuming the agreement to be voidable, as the House seemed to think it was, and that no notice was required to enable the vicar to bring the occupiers to account, yet the vicar was not entitled to maintain the suit without giving up possession of or waiving his right to the land.—*Plowden v. Thorpe*, W. 42.

TITHE COMMUTATION ACT.

(*Limitation of actions.*) Where the bill was filed against the occupiers within the time prescribed by the act, but the tenant for life was made a party by amendment after the time had gone by, *semble* that as against him the suit was too late.—*Plowden v. Thorpe*, W. 42.

TRIAL OF CAUSE.

(*Immaterial issue.*) A judge may without the consent of the parties discharge the jury from giving a verdict upon issues neither material to the judgment nor to the costs.—*The King v. Johnson*, C. & F. 41.

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ABSTRACT OF THE PUBLIC GENERAL STATUTES.

(4 & 5 VICTORIÆ.)

- CAP. 1.—An Act to settle an Annuity on Lord Keane, and the Two next Surviving Heirs Male of the Body of the said Lord Keane, to whom the Title of Lord Keane shall descend, in consideration of his great and brilliant Services.
[30th March, 1841.]
- CAP. 2.—An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.
[30th March, 1841.]
- CAP. 3.—An Act for the Regulation of Her Majesty's Royal Marine Forces while on Shore.
[30th March, 1841.]
- CAP. 4.—An Act to apply the Sum of Eight Millions out of the Consolidated Fund to the Service of the Year One thousand eight hundred and forty-one.
[30th March, 1841.]
- CAP. 5.—An Act to facilitate the Recovery of Arrears of Tithe Compositions in Ireland, vested in Her Majesty under the Provisions of an Act of the First and Second Years of Her present Majesty, for abolishing Compositions for Tithes in Ireland, and for substituting Rent-charges in lieu thereof. [30th March, 1841.]
- CAP. 6.—An Act to continue, until the Fourth Day of August, One thousand eight hundred and forty-two, and to the End of the next Session of Parliament, the several Acts for regulating Turnpike Roads in Ireland, which will expire at or before the End of the present Session of Parliament, or at or before the End of the Session of Parliament next after the Fourth Day of August, One thousand eight hundred and forty-one; and to amend the Acts for regulating Turnpike Roads in Ireland.
[6th April, 1841.]
- CAP. 7.—An Act to amend the Acts of the last Session for taking account of the Population.
[6th April, 1841.]
- CAP. 8.—An Act to reduce the Duty on Rum and Rum Shrub, the Produce of and imported from certain British Possessions in the East Indies into the United Kingdom.
[6th April, 1841.]
- CAP. 9.—An Act for removing Doubts as to the Continuance of certain Local Turnpike Acts.
[6th April, 1841.]
- All local turnpike acts which, unless continued, would have expired with the session of 1834 or since, or will expire at or before the end of the session of 1841, are declared to have been and to continue in force till the 1st June, 1842, and to the end of the then Parliament.
- CAP. 10.—An Act for extending to the County of the City of Dublin the Provisions of an Act passed in the Nineteenth and Twentieth Years of His late Majesty King George the Third, in Ireland, intituled, An Act to prevent the detestable Practices of houghing Cattle, burning of Houses, Barns, Haggards, and Corn, and for other Purposes, so far as relates to burning of Houses.
[6th April, 1841.]
- CAP. 11.—An Act to indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and to extend the Time limited for those Purposes respectively until the Twenty-fifth day of March, One thousand eight hundred and forty-two; and for the relief of Clerks to Attornies and Solicitors in certain cases.
[10th May, 1841.]

CAP. 12.—An Act to enable Her Majesty's Commissioners of Woods to make a New Street from Coventry Street, Piccadilly, to Long Acre, and for other Improvements in the Metropolis. [10th May, 1841.]

CAP. 13.—An Act to authorize the Advance of a Sum of Money out of the Consolidated Fund on account of the Colony of South Australia. [10th May, 1841.]

CAP. 14.—An Act to make good certain Contracts which have been or may be entered into by certain Banking and other Copartnerships. [18th May, 1841.]

S. 1. No banking association or copartnership, nor any contract entered into between or by them heretofore, or which may be hereafter formed, shall be illegal or void by reason of spiritual persons being members of the association: *Provido*, that no spiritual person benefited, or performing the duties of any ecclesiastical office, shall act as a director.

S. 2. In all actions and suits by such copartnership, established since the end of the session of 2 & 3 Victoria, in case the defendant shall, before 29th March, 1838, have pleaded the invalidity of the contract by reason of any spiritual person being a member, he shall be entitled to taxed costs; and the Court or a judge may make order for further costs.

S. 3. Act may be amended or repealed this session.

CAP. 15.—An Act for the Erection at Edinburgh of a Monument to the late Sir Walter Scott. [18th May, 1841.]

CAP. 16.—An Act to enable the Commissioners of Wide Streets to sell, and Her Majesty to purchase, certain Hereditaments in the City of Dublin, on the North Bank of the River Anna Liffey. [18th May, 1841.]

CAP. 17.—An Act to abolish Arrest in Personal Actions commenced by Process of Subpoena at the Law Side of the Court of Exchequer in Ireland.

[18th May, 1841.]

CAP. 18.—An Act to make further Provision for facilitating and completing the Distribution and Payment of Compensation for Slaves upon the Abolition of Slavery. [18th May, 1841.]

CAP. 19.—An Act for raising the Sum of Eleven Millions by Exchequer Bills, for the Service of the Year One thousand eight hundred and forty-one.

[18th May, 1841.]

CAP. 20.—An Act to alter and amend certain Laws relating the Collection and Management of the Duties of Excise. [18th May, 1841.]

CAP. 21.—An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties. [18th May, 1841.]

S. 1. Every deed or instrument of release of a freehold estate, executed after 15th May, 1841, and expressed to be made in pursuance of this act, to be as effectual, and to take effect as a conveyance to uses or otherwise, and to operate at law and in equity as if the releasing parties had also executed a lease for a year: provided that the release shall be chargeable also with the stamp duty on the lease for a year.

S. 2. The recital or mention of a lease for a year, in a release executed before the passing of this act, to be evidence of the execution of such lease for a year: and such release to have the same effect as if executed after the passing of the act, whether the lease for a year shall or shall not be lost, or shall or shall not be produced: *proviso*, that the act shall not prejudice any proceedings in which the validity of any lease for a year shall be in question at the passing of the act, or give validity to it, if the result of the proceedings be to invalidate it.

S. 3. The word "freehold" to extend to all lands for the conveyance of which a lease and release would have been used, but for this act.

S. 4. Act may be amended or repealed this session.

CAP. 22.—An Act to remove Doubts as to the Liability of Lords and Peers of Parliament to Punishment in certain Cases of Felony. [21st June, 1841.]

Repeal of 1 Edw. 6, c. 12, s. 13: and every peer against whom any indictment for felony may be found, shall plead thereto, and on conviction be liable to the same punishment as any other of her majesty's subjects.

CAP. 23.—An Act to suspend until the Thirty-first Day of August, One thousand eight hundred and forty-two, the making of Lists and the Ballots and Enrolments for the Militia of the United Kingdom. [21st June 1841.]

CAP. 24.—An Act to amend an Act to grant certain Powers to Heirs of Entail in Scotland, and to authorize the Sale of Entailed Lands for the Payment of certain Debts affecting the same, [21st June, 1841.]

CAP. 25.—An Act to amend and continue for One Year, and to the end of the then next Session of Parliament, the several Acts relating to the regulation and keeping of Arms and Gunpowder in Ireland. [21st June, 1841.]

CAP. 26.—An Act to continue Compositions for Assessed Taxes until the Fifth Day of April, One thousand eight hundred and forty-three. [21st June, 1841.]

CAP. 27.—An Act to enable Her Majesty's Commissioners of Woods to complete the Contract for the Sale of York House, and to purchase certain Lands for a Royal Park. [21st June, 1841.]

CAP. 28.—An Act to prevent Plaintiffs in certain frivolous Actions from obtaining their full Costs of Suits. [21st June, 1841.]

S. 1. Repeal of 3 & 4 Vict. c. 24, as to actions wherein verdicts had been returned before it passed.

S. 2. No plaintiff who before the passing of the 3 & 4 Vict. obtained a verdict for less than 40s., shall now be entitled to costs, unless he was so immediately before the passing of that act; proviso, that if any such plaintiff shall have proceeded, since the passing of that act, and before 3d May, 1841, to tax his costs on any such verdict, this act shall not deprive him of any remedy thereupon; but the Court or a judge may stay the proceedings on payment of such costs as they shall think fit.

CAP. 29.—An Act for granting to Her Majesty, until the Fifth Day of July One thousand eight hundred and forty-two, certain Duties on Sugar imported into the United Kingdom, for the Service of the Year One thousand eight hundred and forty-one. [21st June 1841.]

CAP. 30.—An Act to authorize and facilitate the Completion of a Survey of Great Britain, Berwick-upon-Tweed, and the Isle of Man. [21st June, 1841.]

CAP. 31.—An Act to provide for the Surrender of Premises formerly used for Court Houses, but no longer used for that purpose, in Ireland. [21st June, 1841.]

CAP. 32.—An Act to amend an Act to extend the Practice of Vaccination.

[21st June, 1841.]

CAP. 33.—An Act to amend the Acts for regulating Turnpike Roads, so far as they relate to certain Exemptions from Toll. [21st June, 1841.]

S. 1. No toll shall be taken for any horse, ass, sheep, swine, or other beast or cattle, or any carriage, which shall only cross any turnpike road, or not pass above 100 yards thereon.

S. 2. All the provisions of the 3 Geo. 4, c. 126, and other general turnpike acts, to be considered as re-enacted in this act.

S. 3. This act not to extend to any roads exempted out of the 3 Geo. 4, c. 126.

CAP. 34.—An Act to explain and amend an Act of the Fifth Year of King George the Fourth, for repealing certain Duties on Law Proceedings in the Courts in Great Britain and Ireland respectively, and for better protecting the Duties payable upon Stamped Vellum, Parchment, or Paper. [21st June, 1841.]

S. 1. Repeals the stamp duty of 2s. 6d. imposed by the 55 Geo. 3, c. 184, on affidavits to be filed or used in any of the courts, &c., whether to be used in any action or suit, or otherwise howsoever.

S. 2. Nothing in the 5 Geo. 4, c. 41, or in this act, to be taken to repeal the stamp duty on other affidavits.

CAP. 35.—An Act for the Commutation of certain Manorial Rights in respect of Lands of Copyhold and Customary Tenure, and in respect of other Lands subject to such Rights, and for facilitating the Enfranchisement of such Lands, and for the Improvement of such Tenure. [21st June, 1841.]

S. 1. Provides for the appointment of the Tithe Commissioners as commissioners to carry this act into execution.

S. 2. Style of commissioners; to have a common seal; instruments sealed with their seal to be received in evidence without further proof.

S. 3. Commissioners to report from time to time to the secretary of state, and to make a general report once a year, which is to be laid before parliament.

S. 4. Power to appoint and remove assistant commissioners, secretary, &c.

S. 5. Commissioners not to sit in the House of Commons.

S. 6. The operations of the act as to appointments limited to five years.

S. 7. Provision for salaries and allowances.

S. 8. Salaries, &c. to be paid out of the Consolidated Fund.

S. 9. Declaration to be made by commissioners, &c.

S. 10. Power to commissioners to delegate certain of the powers to assistant commissioners, &c.

S. 11. Power to substitute persons nominated by the commissioners for the lord or tenant of a manor, &c. when they are under disabilities.

S. 12. Power to parties interested to appoint agents by power of attorney, for the purposes of the act: proviso for revocation of power of attorney.

S. 13. Meetings may be called of lords or tenants of manors, or other parties interested, on twenty-one days notice, for the purpose of agreeing on terms of commutation of their rents, fines, &c.: at such meetings the lord and three-fourths in number of the tenants, and three-fourths in value of the interests in the manor, may agree on terms for the general commutation of rents, fines, &c.

S. 14. Agreements to be made, subject to the terms therein mentioned.

S. 15. Commutations may take place in consideration of a fine on death or alienation, or at a fixed period.

S. 16. Power to make provisional agreements.

S. 17. Mode of computing proportional interests of tenants for the purpose of voting.

S. 18. Provides for adjournment of meetings on notice.

S. 19. Agreements to bear date on the day when the first signature is attached, and to be in the form which the commissioners shall direct.

S. 20. Commissioners to frame and circulate forms, &c.

S. 21. Suits and differences as to rights to manorial rights or boundaries may be referred to arbitration: saving of rights of parties in reversion, &c.

S. 22. Agreements not to be made without consent of ecclesiastical persons, &c. interested in the manor.

S. 23. Agreements to be confirmed by the commissioners.

S. 24. Provides for appointment of valuers on the part of the lord and the tenants.

S. 25. Valuations to be sent in to commissioners, who are to appoint umpires.

S. 26. Valuers may enter on lands, and make admeasurements, &c. Valuers and umpires not to act until they have made a declaration.

S. 27. Stewards of manors to furnish information required by the valuers and commissioners; and to make a schedule or statement as the commissioners shall direct: stewards may require information from tenants; penalty on tenants for refusal, or giving false information.

S. 28. Valuers to take the particular circumstances of each case into consideration, according to the directions herein given.

S. 29. Schedules of valuation to be deposited for inspection, and a meeting appointed for hearing objections by the commissioners or an assistant commissioner; power to them to adjourn meetings, and upon hearing to amend valuations, &c.

S. 30. Provision for expenses of proceedings under the act.

S. 31. Schedule of apportionment to be made by the commissioners, containing all awards, orders, and declarations, necessary for carrying the act into execution.

S. 32. Schedule of apportionment to be inspected, errors pointed out, and the schedule then confirmed.

S. 33. Copies of the schedule to be deposited with the steward of the manor and the clerk of the peace.

S. 34. Provision for notice to parties before confirmation of agreements, valuations, &c.

S. 35. Power to commissioners, with consent of parties, to correct errors in the proceedings after confirmation.

S. 36. From the 1st January next, after the confirmation of any apportionment, the lands of the manor to be discharged from all rents, fines, and hereditaments now payable, and a rent-charge and fixed fine to be paid in lieu thereof, according to the scale herein mentioned.

S. 37. Schedule of apportionment to specify in what event a rent-charge is to be increased or diminished.

S. 38. If valuers be not appointed within six months after confirmation of the agreement, or their valuation be not made within that period, commissioners to appoint valuers with like powers.

S. 39. Power to commissioners or assistant commissioner, to hear and determine disputes as to the right to or amount of fines, or other manorial payments or incidents; but their decision not to affect the right to mines or minerals.

S. 40. Persons dissatisfied with their decision may appeal by issue at law, or on case stated for the opinion of a Court of law: verdict not set aside by the Court to be final: costs to be in the discretion of the Court.

S. 41. Proceedings under the act not to abate by death of parties.

S. 42. In case of the death of parties before actions brought or cases stated, the same to be brought and carried on in their names.

S. 43. Power to commissioners, &c. to examine witnesses on oath, and call for the production of deeds, papers, &c.

S. 44. Provision for witnesses' expenses.

S. 45. Tenant paying rent-charge or expenses chargeable under the act, to be allowed the same in account with his landlord.

S. 46. On proofs by the occupier that he holds the lands for a term of years of a tenant of the tenant, at a lower rent than the commutation rent, the agreements to be declared void as to such lands, unless the tenant on the rent-roll shall give satisfactory security for the payment of the charges.

S. 47. If rent-charge be in arrear for twenty-one days after half-yearly days of payment, the person entitled thereto may distrain.

S. 48. When rent-charge is in arrear for forty days after half-yearly days of payment, and there is no sufficient distress on the premises, a writ to be issued directing the sheriff to summon a jury to assess the arrears.

S. 49. The Court or a judge to order the owners of the rent-charge in possession under the writ to render an account of receipts and payments, and pay over the surplus to the party entitled.

S. 50. Powers of the 4 & 5 Will. 4, c. 22, extended to rent-charges under this act.

S. 51. Rents, fines, &c. due before the 1st January next after the confirmation not to be affected by this act.

S. 52. Power to lord and any tenants to effect a voluntary commutation; but not so as to affect the interests of stewards holding their office permanently. Proviso for notice to parties in remainder or reversion.

S. 53. Power to lords of manors to use, for the recovery of commutation fine, the like remedies as are authorized by the 11 G. 4 and 1 W. 4, c. 65.

S. 54. Power to lord and tenants to effect a supplemental or substituted commutation of manorial rights.

S. 55. Apportionment of commutation rents and fines to be effected by an entry of apportionment on the court rolls in the manner used in apportionment of quit-rents.

S. 56. Power to lords and tenants to effect voluntary enfranchisements of copyhold lands:—Proviso for notice to parties in remainder or reversion.

S. 57. If the agreement for enfranchisement be not entered into by all the tenants of the manor, or if their number be less than twelve, or, whatever be their number, if the parties think fit, an enfranchisement may be effected by deed, as if the land were seised in fee.

S. 58. Commissioners, before giving their consent to an agreement for enfranchisement, to satisfy themselves of the title to the manor; and the expenses of such investigations, as well as the general expenses, to be borne by the parties in the proportions agreed on, and in default of agreement, as the commissioners shall direct.

S. 59. Provision for payment of enfranchisement money, where the lord's interest is a partial one, or he is under any legal disability.

S. 60. Tenants may, in certain cases, defer the payment of a portion of the consideration money for enfranchisement until the next event at which a fine would be payable.

S. 61. When such sum becomes due, the lord to be entitled to the rent and profits of the land, and may proceed to obtain possession, &c.

S. 62. Power for other tenants to defer payment of consideration money for enfranchisement.

S. 63. Where such payments are deferred by tenants, provision to be made for such lords as are only tenants for life.

S. 64. Lands enfranchised to be held under the same titles as before, and not to be subject to any estates or charges affecting the manor.

S. 65. Provision for general expenses of proceedings under the act.

S. 66. Right of action for expenses in certain cases.

S. 67. Provision for expenses of trustees.

S. 68. Copyholders having limited interests may in certain cases charge expenses or costs paid by them upon the lands.

S. 69. Expenses payable by lords of manors may be charged on the manors.

S. 70. Lands to be charged with the consideration money for enfranchisements as upon a mortgage in fee.

S. 71. Such sums to be first charges on the lands, and to have priority over all incumbrances except tithe rent-charges.

S. 72. Power to tenants whose lands are enfranchised to charge the estates with payment of consideration money and expenses by mortgage.

S. 73. Monies to be paid for enfranchisement from the lord's rights to be paid to the lord, where he is seised in fee or has power to give an effectual discharge; and in case of a limited estate or disability the money, if amounting to 200*l.*, to be paid into the Bank of England according to the 1 Geo. 4, c. 55.

S. 74. Provision for payment when the sum is less than 200*l.*, and exceeding 20*l.*

S. 75. The like, when not exceeding 20*l.*

S. 76. In case enfranchisement money be paid to a lord not entitled thereto, the land to continue charged in favour of the party really entitled, with all legal and equitable remedies against the party who has wrongfully received the money.

S. 77. Sums payable for compensation to stewards to be paid to them or their personal representatives.

S. 78. Receipts of parties to whom payments are made pursuant to the act to be sufficient discharges.

S. 79. After confirmation of apportionment, &c. in cases of commutation, the customary modes of descent to cease and the lands to descend and be subject to dower and curtesy in like manner as freehold lands: exception as to husbands or widows married before the confirmation.

S. 80. Gavelkind excepted from the operation of the act.

S. 81. In cases of enfranchisement, lands to become freehold from the final confirmation of the apportionment or execution of the conveyance, subject to the payment of the enfranchisement consideration: proviso for continuance of commonable rights, and for mortgages, wills, &c.

S. 82. No commutation to affect any other manorial rights of lords.

S. 83. The act not to prevent any commutation or enfranchisement to be made independently thereof; nor to revive rights to manorial claims barred by the statutes of limitations.

S. 84. Power to tenants to grant rights of way, &c. to lords of manors for mining purposes.

S. 85. Power to Courts of equity to decree a partition of lands of copyhold or customary tenure.

S. 86. After 31st December 1841, lords of manors or their stewards may hold customary courts, although no copyhold tenant be present.

S. 87. After 31st December 1841, lords or their stewards may make, off the manors and out of court, grants of lands to be held by copy of court-roll.

S. 88. After 31st December 1841, lords or their stewards may grant admissions off the manor and out of court.

S. 89. After 31st December 1841, every surrender, &c. delivered to the lord or steward, and every fact proved to the lord or steward, at any court at which a homage shall not be assembled, shall forthwith be entered on the court-rolls.

S. 90. After 31st December 1841, presentment by the homage shall not be necessary to the validity of an admittance.

S. 91. Lords of manors, in certain cases, not to grant common or waste lands without the consent of the homage assembled at a customary court.

S. 92. Power to lords to grant licenses to tenants to alienate their ancient tenements in portions, where they are now restrained by the custom from so doing.

S. 93. Agreements, awards, schedules, &c. made under this act, to be exempt from stamp duty.

S. 94. False evidence given under the provisions of the act to be deemed perjury; and wilfully withholding evidence or altering documents a misdemeanor.

S. 95. Provisions for limitation of actions against commissioners, assistant commissioners, justices, &c.

S. 96. Proceedings not to be quashed for want of form or removed by certiorari.

S. 97. Certain provisions of the act to extend to crown manors and lands.

S. 98. Act to apply to crown lands only where expressly provided.

S. 99. Act not to extend to the duchy of Cornwall.

S. 100. Act to extend only to England, Wales, and Ireland.

S. 101. Act may be amended or repealed this session.

S. 102. Interpretation clause.

CAP. 36.—An Act to amend an Act of the Fifth and Sixth Years of King William the Fourth, "For the more easy Recovery of Tithes;" and to take away the Jurisdiction from the Ecclesiastical Courts in all Matters relating to Tithes of a certain amount. [21st June, 1841.]

All the provisions of the 5 & 6 Will. 4, c. 74, respecting suits for tithes due from Quakers, to extend to all ecclesiastical Courts in England.

CAP. 37.—An Act for the more easy Recovery of Arrears of Compositions for Tithes from Persons of the Persuasion of the People called Quakers in Ireland. [21st June, 1841.]

CAP. 38.—An Act to afford further Facilities for the Conveyance and Endowment of Sites for Schools. [21st June, 1841.]

CAP. 39.—An Act to explain and amend Two several Acts relating to the Ecclesiastical Commissioners for England. [21st June, 1841.]

CAP. 40.—An Act to empower the Commissioners of Her Majesty's Woods to raise Money for certain Improvements in the Metropolis on the Security of the Land Revenues of the Crown within the County of Middlesex and City of London. [21st June, 1841.]

CAP. 41.—An Act to provide for the Payment of Debts, Charges, and Incumbrances affecting Houses of Industry and Workhouses, and of Advances made, conformably with previous Usage, for the lawful Purposes of such Houses of Industry and Workhouses in certain Cases in Ireland. [21st June, 1841.]

CAP. 42.—An Act to remove Doubts as to the Division of the Parish of Winterbourne, in the County of Gloucester, into Two Parishes. [21st June, 1841.]

CAP. 43.—An Act to continue until the Thirty-first Day of December, One thousand eight hundred and forty-two, and until the End of the then next Session of Parliament, an Act of the Tenth Year of King George the Fourth, for providing for the Government of His Majesty's Settlements in Western Australia, on the Western Coast of New Holland. [21st June, 1841.]

CAP. 44.—An Act to continue until the Thirty-first Day of December, One thousand eight hundred and forty-two, and from thence until the End of the next ensuing Session of Parliament, certain Acts for providing for the Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof. [21st June, 1841.]

CAP. 45.—An Act to amend an Act passed in the Third and Fourth Years of the Reign of His late Majesty King William the Fourth, intituled An Act to amend the Laws relating to Sewers. [21st June, 1841.]

S. 1. Empowers Courts of Sewers to raise money by tax on lands within their jurisdiction, for the purposes therein mentioned.

S. 2. The Courts may order the apportionment and collection of the tax.

S. 3. General sewers' tax and apportionment to be final, unless appealed against at the next Court.

S. 4. Empowers the Courts of Sewers to borrow and take up money at interest for general purposes : provision for repayment.

S. 5. Courts of Sewers may grant securities to persons advancing money: form of the security given.

S. 6. Parties may transfer their securities by indorsement : form of transfer. Transfers to be produced to the clerk of the commissioners, and to be registered by him.

S. 7. Power to Courts of Sewers to make compensation to jurymen.

S. 8. Courts of Sewers may amend or quash the rate on appeal.

S. 9. Rated persons not to be incompetent as witnesses.

S. 10. Provision for the choice of a chairman at courts or meetings of commissioners.

S. 11. Power to commissioners to hold courts and meetings at any place no more than ten miles from the limits of their jurisdiction.

S. 12. Regulates the holding of meetings of commissioners.

S. 13. Saving powers of Courts of Sewers under former Sewers' Acts.

S. 14. Indemnities and liabilities of the 3 & 4 Will. 4, c. 22, extended to this Act.

S. 15. This Act not to prejudice any local or private Sewers' Act.

S. 16. Saves the rights of the City of London.

S. 17. Saves the rights and powers of the commissioners of sewers for Westminster, &c.

S. 18. Saves the rights of the Bedford Level Corporation.

CAP. 46.—An Act to empower the Commissioners for the Issue of Exchequer Bills for Public Works to complete the Works authorized to be made by an Act of the Sixth and Seventh Year of His late Majesty King William the Fourth, "for improving the Navigation and Harbour of Tralee, in the County of Kerry," and to extend the Time for that purpose. [21st June, 1841.]

CAP. 47.—An Act to amend an Act of the last Session, for continuing and amending the Laws for the Relief of Insolvent Debtors in Ireland. [21st June, 1841.]

CAP. 48.—An Act to render certain Municipal Corporations rateable to the Relief of the Poor in certain Cases. [21st June, 1841.]

S. 1. The municipal corporations mentioned in the schedules (A.) and (B.) to the 5 & 6 Will. 4, c. 76, to be rateable to the relief of the poor in respect of lands their property, and in their occupation, as if they were not corporate property. Proviso, that where the property lies in any parish wholly within the boundaries of a city or borough, in which the poor are relieved by one entire poor rate, or in which the poor within its municipal boundaries, at the passing of the 5 & 6 Will. 4, were relieved by one entire rate, the exemption from rateability shall continue.

S. 2. The corporations to be deemed beneficial occupiers for all the purposes of rating, and to be rated by their corporate title.

CAP. 49.—An Act to provide for repairing, improving, and rebuilding County Bridges. [21st June, 1841.]

S. 1. Justices at sessions may borrow money for repairing county bridges on the credit of the county rate, and may agree with parties for loans; copies of such agreements to be kept by the clerk of the peace; securities to be transferable by indorsement, and the parties to be creditors *pari passu*,

S. 2. Justices may charge the county rate with interest on the money borrowed, and such further sum as shall insure the repayment of the principal in fourteen years: books to be kept of receipts and payments, and accounts to be inspected at every sessions.

S. 3. Four weeks' notice, signed by two justices at least, to be given to the clerk of the peace, and advertised in the newspapers, before any order for borrowing money on mortgage of the county rate.

S. 4. The provisions of the 6 Geo. 4, c. 40, applied to this Act.

S. 5. Act may be amended or repealed this session.

CAP. 50.—An Act to make further Provision relative to the Returns to be made by Banks of the Amount of their Notes in Circulation. [21st June, 1841.]

CAP. 51.—An Act to amend an Act of the Third Year of King George the Fourth, for regulating Turnpike Roads in England, and also an Act of the Fifth and Sixth Years of King William the Fourth, for consolidating the Laws relating to Highways in England. [21st June, 1841.]

All lands and grounds in the exclusive occupation of one or more persons for agricultural purposes shall be deemed inclosed lands and grounds within the meaning of the 3 Geo. 4, c. 126, and 5 & 6 Will. 4, c. 50, although not separated from any adjoining land or from the highway by any fence or inclosure.

CAP. 52.—An Act to amend an Act of the Fourth Year of Her present Majesty, intituled An Act for facilitating the Administration of Justice in the Court of Chancery. [21st June, 1841.]

S. 1. So much of the 3 & 4 Vict. c. 94, as prevents the rules, &c. made under the Act from having effect till each house of parliament shall have sat thirty-six days after the rules have been laid before them, repealed: and such rules, &c. to be binding from the making thereof, unless objected to by vote of either house of parliament within thirty-six days; but not to have the force of a statute unless expressed to be made in pursuance of the 3 & 4 Vict. and of this Act, and to be void unless laid before parliament within the time prescribed by the 3 & 4 Vict.

S. 2. Interpretation clause.

CAP. 53. An Act to apply certain Sums of Money to the Service of the Year One thousand eight hundred and forty-one, and to appropriate the Supplies granted in this Session of Parliament. [22nd June, 1841.]

CAP. 54.—An Act to continue until the First Day of January One thousand eight hundred and forty-four an Act of the last Session of Parliament, for continuing

an Act for amending and extending the Provisions of an Act of the First year of Her present Majesty, for exempting certain Bills of Exchange and Promissory Notes from the Operation of the Laws relating to Usury. [22nd June, 1841.]

The 3 & 4 Vict. c. 83, continued till 1st January, 1844.

CAP. 55.—An Act further to continue, until the First Day of April, One thousand eight hundred and forty-two, an Act of the Third and Fourth Year of the Reign of Her present Majesty, intituled An Act to amend the Laws relating to Loan Societies. [22nd June, 1841.]

The 3 & 4 Vict. c. 110, further continued till 1st April, 1842.

CAP. 56.—An Act for taking away the Punishment of Death in certain Cases, and substituting other Punishments in lieu thereof. [22nd June, 1841.]

S. 1. Recites the 15 G. 2, c. 13, s. 12, as to embezzlement by servants of the Bank of England of any note, bill, dividend warrant, bond, deed, &c. of the company; the 35 G. 3, c. 66, s. 6, and 37 G. 3, c. 46, s. 6, as to embezzlement of securities relating to Irish and other annuities transferred to the Bank of England; the 24 G. 2, c. 11, s. 3, as to embezzlement by servants of the South Sea Company of securities of the company; the 55 G. 3, c. 184, s. 7, and c. 185, s. 7; as to the fraudulent using &c. of stamps for deeds and plate; and the 6 G. 4, c. 85, s. 18, as to returning from transportation in St. Helena, &c.: and repeals the punishment of death for such offences, and subjects them to transportation for life or not less than seven years, or imprisonment for not more than three years.

S. 2. Persons convicted of the riotous demolition of churches, houses, &c. &c. [7 & 8 G. 4, c. 30, s. 8,] to be no longer punishable with death, but with transportation for not less than seven years, or imprisonment for not more than three years.

S. 3. Rape, and the carnal knowledge of girls under ten years no longer to be punishable with death, but with transportation for life.

S. 4. Provision as to hard labour and solitary confinement.

S. 5. This act to affect the gaol acts, 5 & 6 W. 4, c. 38, or 4 G. 4, c. 64.

S. 6. None of the above offences to be triable before justices in quarter sessions.

S. 7. Act to commence 1st October, 1841.

CAP. 57.—An Act for the Prevention of Bribery at Elections. [22nd June, 1841.]

When any charge of bribery is brought before an election committee, evidence of bribery shall be receivable on the whole matter, without first proving agency; and the committee shall report specially on the facts of bribery proved before them, and whether they were committed with the knowledge of the member or candidate.

CAP. 58.—An Act to amend the Law for the Trial of Controverted Elections.

[22nd June, 1841.]

[This Act is a re-enactment of the 2 & 3 Vict. c. 38, except as to the following clauses, which are new or altered.]

S. 31. When more than one petition relating to the same election is referred to the general committee of elections, they shall suspend their proceedings therein till receipt of the examiner's report on each of the petitions; and on receipt of the report on the last, they shall place such petitions at the bottom of the list, bracketed together, and they shall afterwards be dealt with as one petition.

S. 38. On the next meeting of the house after the last day for questioning returns, the clerk shall read over the names of all excused members,

S. 43. makes the service on the chairmen's panel compulsory instead of voluntary.

S. 46. Power to the general committee to transfer to another panel the names of members obtaining leave of absence.

S. 49. General committee to determine how many committees shall be chosen in each week ; and notice of the time when any committee will be chosen to be published with the votes, and to be sent to the returning officer fourteen days before, in case his conduct be complained of.

S. 50. Notice to be published with the votes of the petitions appointed for each week and of the panel from which the committees will be chosen.

S. 51 contains amended provisions for the cases where the sitting member does not defend his seat, and some party has been admitted to defend, &c.

S. 52 empowers the general committee to change the day for choosing the select committee.

S. 96. Act to commence at the end of the present session, and to continue in force till the end of the second session of the next parliament, but all proceedings commenced under the act to be proceeded in notwithstanding its expiration.

CAP. 59. An Act to authorize for One Year, and until the end of the then next Session of Parliament, the Application of a Portion of the Highway Rates to Turnpike Roads, in certain Cases. [22nd June, 1841.]

S. 1. Justices at special sessions for highways, on proof of the deficiency of the funds of any turnpike trust, may order payment to the trust of a portion of the highway rate.

S. 2. If any parish surveyor neglect to pay over such portion of rate, it may be levied by distress on his goods.

S. 3. Power of appeal to justices at quarter sessions.

S. 4. Interpretation clause.

S. 5. Act to extend only to England.

S. 6. Act to continue for a year, and to the end of the then next session of Parliament.

S. 7. Act may be amended or repealed this session.

CAP. 60. An Act to alter and amend certain Acts regulating Madhouses in Scotland ; and to provide for the Custody of dangerous Lunatics.

[22nd June, 1841.]

CAP. 61. An Act to defray the Charge of the Pay, Clothing, and contingent and other Expenses of the Disembodied Militia in Great Britain and Ireland ; and to grant allowances in certain Cases to Subaltern Officers, Adjutants, Paymasters, Quarter Masters, Surgeons, Assistant Surgeons, Surgeons' Mates, and Serjeant Majors of the Militia, until the First Day of July, One thousand eight hundred and forty-two. [22nd June, 1841.]

EVENTS OF THE QUARTER.

EVERY change of government necessarily causes a corresponding change in the condition and prospect of the leading members of the bar; and the change now impending promises to be more than ordinarily fertile of such effects. We presume the appointment of Sir John (now Lord) Campbell to the Irish Chancellorship may fairly be set down as one of these; for had not the occasion been exceedingly pressing, Lord Plunkett would hardly have been pushed from his stool with such indecent precipitancy to make way for him. It is a remarkable sign of the little faith reposed in the coming fortunes of the Whig party, that no one could be induced to fill the vacant post of Solicitor-General, though report says that it was offered to three or four gentlemen in succession, who by accepting it would have established an indisputable claim to high preferment on the return of their friends to power.

Perhaps one of the most injudicious steps ever taken by that very clever party chief, Lord John Russell, was the throwing up of the Administration of Justice in Equity Bill in a pet, as soon as a vote of the House of Commons had decided that the appointments should not take place till after the meeting of the new parliament; in other words, that they should be retained for a ministry possessing the confidence of the country and feeling responsible for its acts. By throwing up the bill Lord John virtually admitted that his sole object was the patronage, besides betraying a consciousness that his days as an official man were numbered; and he has thus been the means of delaying the operation of the measure for several months. It will no doubt be brought forward again with all convenient speed. Two new judgeships will be thereby created; and it is not unlikely that a vacancy or two on the Bench may be made by resignation before long. The Conservative part of the profession, therefore, confessedly not the least distinguished for talents and acquirements, will have no reason to repine. Notwithstanding the rumours to the contrary, we see no reason to doubt that Lord Lyndhurst will accept the Great Seal.

We regret to say that many lawyers of distinction, whose assistance might prove advantageous to the legislature, have failed to secure seats; amongst those whose absence will be regretted, may be named Mr. Serjeant Talfourd, Mr. Kelly, Mr. Erle, Mr. Ingham, Mr. Tooke, and Mr. Freshfield.

Messrs. Whately, Godson, Sutton Sharpe, Knowles, Baines, and Stuart Wortley have been appointed Queen's counsel; Mr. Austin has received a patent of precedence, and Mr. Thompson has taken the coif.

According to a parliamentary return, no order has yet been made under the Custody of Infants Bill, and its quondam opponents are pointing to this result as a justification of their views. Now, if we remember rightly, it was confidently urged that domestic happiness would receive its death-blow from the measure; and our answer was, that its capacity for mischief was enormously overrated, that the direct operation would be limited to a few extreme cases, and that the chief advantage was to be anticipated from the silent, indirect, moral influence of the check. According to the supposed test, the Bill may have done good, and cannot have done harm.

A desperate effort was made at the end of last term by the judges of the Queen's Bench to diminish the arrears of new trials, which had accumulated to a startling extent. They managed to dispose of nearly a hundred in the course of a single week, leaving about eighty on the list; but it may be doubted whether this exceeding dispatch will prove altogether satisfactory to the suitors. The average used to be three a day at the outside; let us allow double that number, upon the supposition that, when the arrears are heavy, numerous cases are set down for argument to gain time. The result will be, that between fifty and sixty cases were struck off or withdrawn because the attorneys or counsel were taken by surprise. No doubt they ought to have been ready, yet it is hard that suitors should suffer for this conventional and to some extent excusable want of preparation on the part of the practitioner.

The Committee appointed to consider the expediency of removing the Courts of Law and Equity to Lincoln's Inn Fields have held several meetings, at which various distinguished members of the profession, including many of the judges, have attended for the purpose of delivering their opinions or communicating information. The majority are decidedly in favour of the change.

July 26, 1841.

LIST OF NEW PUBLICATIONS.

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THE LAW MAGAZINE.

ART. I.—LORD CAMPBELL'S NOTIONS OF EQUITY PROCEEDINGS. THE NEW ORDERS IN CHANCERY.

1. *Speech of the Right Hon. Lord Campbell at the close of the Sittings of the Court of Chancery in Ireland, on the 13th day of July, 1841.*
2. *Orders in Chancery, August, 1841.*

LORD Campbell has been an active labourer in the cause of law reform. In the year 1829, he was one of the Real Property Commissioners, whose Report has led to extensive improvements in that branch of the law. Early in 1834 he was appointed Attorney General, and, with the exception of the short period of Sir Robert Peel's administration at the close of 1834 and the commencement of 1835, he continued to hold that office until his recent appointment to be Lord Chancellor of Ireland. During that time a large number of bills connected with improvements in our legal proceedings were brought into the House of Commons, especially with reference to our colonies, to the law of debtor and creditor, to the limitation of actions, and to criminal proceedings. We are only doing justice to Lord Campbell, when we say, that he has always given ready and effective assistance in this laborious species of legislation.

The reputation of the Irish Chancellor, as a law reformer, coupled with his eminence as a leader of the common law Bar, naturally awakened a more than usual degree of attention to the commencement of his career in a Court of Equity. Every one must be aware of the difficulties which a common lawyer necessarily encounters, when he is thus transferred from his own peculiar province to an equitable jurisdiction; when he makes the change, not in the character of barrister, who may often commit errors without producing essential mischief, but

to that of a judge, who is required to extract truth and justice from long and intricate pleadings with as much correctness and certainty, as if he had made them his study during all his professional life. If a lawyer, thus entering upon his noviciate, betrays more than usual caution, walks scrupulously in the path of precedent, and, with a tender regard to the suitor's interest, creeps forward, like one who feels his way in the dark, we may be inclined to complain that he is slow in the execution of his duty, but we ought to give him credit for the exercise of care and patience, while in quest of correct decisions.

The mode in which Lord Campbell commenced his career was totally different. It certainly had the charm of novelty. During how many days or hours he occupied the woolsack before he closed his sittings, we are not informed; but we had scarcely received the news that he had entered upon his high and important office, when we received a copy of the speech of which we now present an extract to our readers.

"As there are no other causes, petitions or motions to be disposed of, the sittings will now close; and I think it proper to mention to the bar, that I purpose forthwith to devote myself to the consideration, how far the procedure of the Court may be farther simplified and improved. I have the satisfaction to find that, where the Chancery practice is different in Ireland and England, that established here is in various instances to be preferred, as discarding useless forms and speeding the suit to a hearing. The mode of enforcing decrees in mortgage suits is likewise much more effectual.

"In the abolition of the Six Clerks' office an example has been set, which England will do well to imitate. This change, I have every reason to believe, has here proved a great relief to the suitors, and has materially facilitated the conduct of business among the solicitors.

"But there can be no doubt that, both in England and Ireland, the administration of justice in Courts of Equity may be still greatly improved by increased expedition and diminished expense.

"While for grievances redressed by the Courts of Common Law a speedy and comparatively cheap remedy is afforded, it must be admitted that when demands are of a fiduciary nature, so that they can only be enforced in a Court of Equity, the delays are often most harassing, and the costs often are so great in proportion to the sum to be recovered, that the more prudent course is to submit to wrong, and to give a triumph to fraud.

"One great cause of the evil is the prolixity of the written pleadings in a suit, which is generally begun by the plaintiff in his bill very

tediously telling his tale three times over. I know it is the opinion of that consummate equity judge, Lord Cottenham, that a simple statement of the facts on which the plaintiff asks for equitable relief would be quite sufficient, and that the other parts of the bill are superfluous.

“But I believe that in various cases, where property is to be administered by the aid of the Court, bills and answers may be entirely dispensed with, and that upon a short petition there may at once be a reference to the Master. The time and expense thus saved in creditors’ suits and others of the same description, it would be difficult to calculate without seeming exaggeration.”

The words which we have printed in italics are those, to which in particular we are anxious to draw the attention of our readers. Similar expressions have frequently been used by writers and speakers, who are passed over in silence, because they are destitute of influence. But when language of this kind comes from a man of Lord Campbell’s reputation, clothed too with all the authority which belongs to the office of Lord Chancellor; and when the name of Lord Cottenham is quoted in approbation of opinions of so latitudinarian a character, we think it high time to investigate the grounds upon which these opinions rest, to see whether they are consistent with the objects of a suit in equity, and whether they ought to be the ground-work of alterations in our proceedings. If our objections to Lord Campbell’s doctrines depended exclusively upon our own notions, we should not be unwilling to avoid the discussion. But in perusing and listening to the opinions of different persons, we have uniformly observed, that doctrines such as those of the noble and learned Lord are repudiated by all who, by long study and practical experience, have become familiar with the advantages and disadvantages incident to equity pleading.

Lord Campbell manifestly refers to those three parts of a bill, which are respectively termed the stating part, the charging part, and the interrogatories. His objection is that, in these three parts, the plaintiff’s story is told three times over. We appeal to one of his Lordship’s predecessors, that great master of Equity pleading, Lord Redesdale, whether this representation is correct. Lord Redesdale, in explaining the nature of a bill in Equity, divides it into nine parts. Having said that the first part consists of the address to the Court,

¹ See *Morning Chronicle*, July 15.

and that the second contains the names and descriptions of the plaintiffs, he proceeds in the following words.¹ "The third contains the case of the plaintiffs, and is commonly called the *stating part* of the bill."

The next part of the bill, to which Lord Campbell refers, is the charging part, which Lord Redesdale describes in the following terms :

"Fifthly, if the plaintiffs are aware of a defence which may be made, and have any matter to allege which may avoid it, the general charge of confederacy is usually followed by an allegation that the defendants pretend or set up the matter of their defence, and by a charge of the matter which may be used to avoid it. This is commonly called the charging part of the bill, and admitting it used for the purpose of obtaining a discovery of the nature of the defendants' case, or to put in issue some matter, which it is not for the interests of the plaintiffs to admit; for which purpose the charge of pretence of the defendants is held to be sufficient. Thus, if a bill is filed on any equitable ground by an heir, who apprehends his ancestor has made a will, he may state his title as heir, and alleging the will by way of pretence of the defendants claiming under it, make it a part of the case without admitting it."²

The remaining part of the bill to which Lord Campbell refers, is the interrogating part of the bill, which Lord Redesdale describes in these words :

"The bill having shown the title of the persons complaining to relief, and that the court has the proper jurisdiction for that purpose, in the seventh place prays, that the parties complained of may answer all the matters contained in the former part of the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, to the information they may have received, and the belief they are enabled to form on the subject. A principal end of an answer upon the oath of the defendants is to supply proof of the matters necessary to support the case of the plaintiffs; and it is therefore required of the defendants either to admit or deny all the facts set forth in the bill, with their attending circumstances, or to deny having any knowledge or information on the subject, or any recollection of it, and also to declare themselves unable to form any belief concerning it. But *as experience has proved* that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add to the general requisition, that the defendants should answer the contents of the bill, a repetition, by way of interrogatory, of the

¹ p. 43.

² Red. Pl. p. 43.

matters most essential to be answered, adding to the inquiry, after each fact, an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer. This is commonly termed the interrogating part of the bill; and as it was originally used only to compel a full answer to the matters contained in the former part of the bill, it must be founded on those matters."¹

Few people would suppose that these three passages of Lord Redesdale's work contain his description of those parts of a bill, which Lord Campbell treats as the threefold repetition of the plaintiff's tale. Bills are not unfrequently drawn, in which there are useless statements, charges which are mere repetition, and interrogatories to which no answer is requisite. In other words, many bills are ill-drawn: but it would be as wise to forbid the cross-examination of witnesses, because an inexperienced counsel has put improper questions, as to strike all charges out of bills in equity, because they are sometimes idly introduced.

We have then the advantage of Lord Redesdale's authority in opposition to the opinions of Lord Campbell, while we offer our own explanation of these different parts of a bill.

In the stating part the plaintiff states his case. He states it independently of any defence which the defendant may think it proper to make; expresses it in the form in which he intends to submit his rights to the Court, and comprehends all the several points upon which, if they are resisted, he intends to take issue. This stating part and the prayer together appear at one time to have made up the entire bill. "Formerly," says Lord Eldon,² "the bill contained very little more than the stating part. I have seen such a bill, with a simple prayer that the defendant may answer all the matters aforesaid, and then the prayer for relief. I believe the interrogating part had its birth before the charging part."

The charging part of the bill is of a nature totally distinct. The matter contained in it may be divided into two classes. Sometimes the plaintiff anticipates a peculiar topic of defence, and believes himself able to meet it by the proof of certain facts. These facts are introduced into the charging part: they form one of the two classes of matter usually contained in that part of the bill. Or it may be that the plaintiff wishes to put in

¹ Red. Pl. p. 44, 45.

² Partridge v. Haycraft, 11 Ves. 574.

evidence certain circumstances which tend to corroborate his case as it appears in the stating part. These circumstances he introduces into the charging part of the bill. They form the matter of the second class.

Few observations are requisite to show that these two classes of matter differ altogether from the matter contained in the stating part. As to the former there is the same difference as there is at common law between the subject-matter of the declaration and that of the replication : as to the latter, the difference can best be compared to the difference between the events on which an action is founded, and the general collateral circumstances by which the narration of the event is found to be correct. It is very possible that matter may be not unfrequently introduced amongst the charges which will not fall within either of the two classes which we have been describing : but we believe that, generally speaking, all such matter may be classed within one or the other. For the present purpose the important point is, that what occurs in the stating part does not, if the bill is properly drawn, occur again in the charging part ; that the offices of these two parts of the bill are distinct from one another, and that the description of them, as given by Lord Campbell, that they are but the same tale told twice over, is altogether erroneous.

We now come to the interrogating part of the bill. It is quite true that propositions which have been *stated* or *charged* are the matter which the interrogatories contain ; and that assertions already made, thus reappear in the form of question. But to describe the interrogatories as the repetition of previous statements and charges, is a form of expression tallying little with the truth, and implies only a superficial acquaintance with the system which, upon this ground of objection, it is proposed to alter. Were a person to enter a common law court, and having read the pleadings and listened to the opening speech of the counsel, to object to the examination of witnesses, on the ground that the matter, which has already appeared upon record, and has been stated in the counsel's speech, is thus repeated interrogatively, he would be censured for having formed his opinion without attending to the different objects for which the different parts of the proceeding are taken. The same principle is applicable to proceedings in equity, as the defendant in equity is the first,

sometimes the only, witness whom the plaintiff calls. Common lawyers, on their first introduction to courts of equity, are apt to overlook many of the consequences which flow from this peculiarity. The defendant is generally the best of witnesses for the plaintiff: for, on the one hand, he has the best information upon the events which have taken place; on the other, he is of all the witnesses, whom the plaintiff may call, the only one whom he is at liberty to cross-examine. The defendant's answer consists of two parts,—his defence to the suit of the plaintiff, and his examination, that is, the evidence which he gives in the form of discovery elicited by the plaintiff's interrogatories. Let this view of the pleadings be once taken and thoroughly understood in all its consequences, the value of the interrogatories will be immediately discovered. Lord Campbell, in representing them as a superfluous part of the bill, has evidently laboured under a total misconception of their office.

Our object has hitherto been to show that Lord Campbell is wrong in his assertion that a plaintiff in a bill in equity tells his tale three times over. We now come to the second point, which we wish to submit to our reader's consideration. This point is, that bills containing the three parts which we have mentioned, are so well calculated to obtain their avowed objects, that no one of these parts can be abolished without diminishing the efficacy of proceedings in courts of equity.

For the consideration of this subject, we must advert to some of the leading principles which prevail in those courts, and meet with general approbation. One of these principles is, that a plaintiff is bound to set forth in his bill his entire case, and to show the light in which he himself chooses to put it. He is bound to let the defendant receive notice in the bill itself of all the facts of which he proposes to tender evidence, and to let the defendant see the precise shape in which those facts will appear upon the evidence, and how they will bear upon the question at issue. On the other hand the defendant is bound to answer all questions bearing upon the point in issue, which the plaintiff introduces into his bill; and, further than this, he is bound to set forth distinctly what is his defence, and in what form the matters constituting his defence will be produced to the Court. Neither party is allowed to give evidence of facts which are not stated in the pleadings;

or, as the rule is shortly expressed, neither party is allowed *to travel out of the record.*

One benefit of these rules arises from the great probability that they will put an early stop to litigation. Persons who embark in differences are often ignorant of what can be alleged against them by their adversaries. Defendants are frequently advised that their case is a good one, until the bill gives correct information of the matter and grounds of complaint: the counsel for plaintiffs often think their clients sure of success, until by a perusal of the answer they become acquainted with the facts which will be brought forward in favour of the defendant. On the one hand, the filing the bill, on the other, the putting in the answer, puts an end to the litigation. Yet it might have continued to great length and considerable expense, if the rules of the Court had not rendered it necessary that each of the two adversaries should make to the other a complete development of his own case.

But it is not merely in these cases in which litigation at once comes to a close, that the advantage of these rules is felt by the suitors. Upon the record it is clear what matters are admitted, what matters remain to be proved, and altogether what will be the subject of argument. In this way the tendency of the system is to reduce dispute into the narrowest possible compass, and to create the fairest prospect of the attainment of justice.

Complaints of the length of equity pleadings, properly drawn, are always founded in a mistake of their true character,—in a forgetfulness that they include the evidence as well as the pleadings: not only the fruits of the special pleader's labour, but also the result of a day's examination in a Court of Nisi Prius. Whenever it so happens, as it does in numerous instances, that the defendant gives such complete evidence upon the matters in issue as to preclude the necessity of other witnesses, the facts are ascertained with a cheapness, if not with an expedition, unknown in any other court of justice. But suppose the practice of the Court were altered by erasing from the bill all the collateral circumstances, all the circumstances tending to refute anticipated answer, and all the circumstances which a want of sufficient knowledge renders a plaintiff unwilling to insert in the stating part of his bill; still some mode must

be allowed of bringing all this matter before the Court. If previous notice of it is to be given to the defendant, there will be a long document which will in reality be an addition to the original record: if no such notice is to be given, there will ensue all the inconveniences which are produced by surprise, and which cannot be remedied unless further proceedings are adopted in some shape or other. The result then of such an alteration will be brevity in the original pleading, but a vast increase of delay and expense before justice can be attained.

Some of these observations are not applicable to the interrogatories. It is true that in this part of the bill the story of the plaintiff, already told in the stating and charging parts, once more makes its appearance. It has been told before by way of assertion; it is now told again by way of question. Here then we come to the inquiry,—Whether a defendant ought or ought not to be required to give evidence; and, if he is to be a witness at all, whether he ought or ought not to be liable to cross-examination as well as to an examination in chief? We at once assume that it is expedient to use the defendant as a witness. If there is one point rather than another in which the advantage of our equity proceeding, as regards a large class of cases, has been universally acknowledged, it is this power of examining the defendant, or, as the process has been termed, of probing the defendant's conscience. Upon this point at least there will prevail amongst our readers no difference of opinion. Then observe the result:—Does any one suppose, that, if the matter of examination is not brought forward in a stringent form, the truth will be elicited; and that too, from the most unwilling of all witnesses, the opposite party himself? If experience warrants such a notion, why is cross-examination ever to be adopted? If a party giving evidence respecting his own interests will voluntarily divulge the entire truth, much rather will equal frankness be found in one who has no personal interest, but is merely a witness. But what would Lord Campbell say to a proposal that a counsel at common law should merely state his case, and then put a simple question to the witnesses as to what they can tell about the matter? Observe Lord Redesdale's words in the passage already quoted, "*Experience has proved that the substance of the matters stated and charged in a bill*

may frequently be evaded by answering according to the letter only."

Assuming, then, that the question upon the matters in issue must not only be put to the defendant, but must also be put in the form best calculated to force out the truth, there remain but two alternatives, one of which must be adopted; either a cross-examination *vivâ voce*, or a cross-examination upon paper. The former expedient Lord Campbell does not suggest, or we should have been ready to consider it. His proposal is to omit this examination altogether, or, as we take the liberty of saying, to take from equity proceedings their characteristic and highest excellence.

As we are writing upon a subject upon which experience is far the safest guide, and as we are venturing to call in question a Chancellor's deliberate opinions, we shall certainly not content ourselves with offering our readers merely our own reasoning. The Commissioners appointed to inquire into Chancery Practice elicited from the ablest practitioners their opinions upon many very important subjects; amongst others, upon the framing of bills. From the Report published by the Commissioners, we quote the following remarks of some of the eminent barristers whom they considered the most capable of giving useful advice and assistance. The following passage is taken from the evidence¹ of Mr. Bell:—

"What has occurred to you upon the subject of Chancery pleading?"—"It does not appear to me that any alteration can be made in the form of our pleadings to much advantage. *There is an objection which has been generally raised, that a bill is a story thrice told, which is not very correct.* That the interrogating part is a repetition of the bill, thrown into the shape of interrogatories, is, in some measure, true, and a thing which I do not see how it is possible to avoid without very great inconvenience, unless it is in amicable causes. In amicable causes, where both parties only mean to state facts fairly and candidly, the interrogating part may be omitted; and I frequently have myself omitted it, or only put a few interrogatories applicable to those defendants over whom I had no particular control, and to whose counsel I could not speak on the subject."

"In general, in the present form of bills, does not the interrogating part consist of inquiries as to every fact before alleged, with an interrogation at the end of each, to this effect, whether it be not

¹ Chancery Report, p. 1.

true as stated, or in some and what other manner?"—"Those are not the words commonly used; the pleader is obliged to vary the manner of the question. It is very difficult to explain, unless a man is trying his skill as a draftsman against an unwilling defendant, how difficult is it often to extract the truth. I am certain in such cases the truth could not be extracted except by very particular interrogatories?"

"Do you then apprehend that it would not answer the same effect, if a form of words could be devised, generally referring once for all to the several matters before stated, and calling upon the defendant to answer them not only circumstantially, but to speak to any variance within his knowledge or belief from the circumstances as stated?"—"I do not think it would be possible to frame any set of words which would answer that purpose when we have an unwilling defendant to deal with?"

"Is it not, in your apprehension, a general and standing rule in all courts of justice, without its being so expressed, that a man who is called upon to answer any matters stated against him, shall answer them in the way pointed out, not according to the circumstances as stated, but according to any variation of circumstances not affecting the substance of what is so charged?"—"I believe that is what every court of justice would expect of an honest man giving his testimony in any shape whatsoever, but unfortunately in the Court of Chancery we have very often to deal with men who are not men of that description; besides that, very often the defendants are so ignorant, and very often so prejudiced with their views of the case, that without a wish to disguise the truth, they will look at and consider the allegation in a very different way from that in which they would if they were indifferent persons; and therefore rather state their own view of the case than give a direct answer if no question is put."

When Mr. Heald was asked,¹ whether it occurred to him that any improvement could be made in the form of a bill, he answered decidedly in the negative. Being particularly questioned upon the interrogating part of a bill, he says, that he believes it, when properly framed, to be as useful as any part of the bill; but both he and Lord Langdale are evidently of opinion, that in certain cases, that is, where discovery is not necessary, the interrogatories may be omitted. Respecting the insertion of collateral matter, which some persons regard as unnecessary, Mr. Heald gives the following opinions:

"I consider that a draftsman, in framing an injunction bill, would

¹ Chancery Report, p. 350.

and ought to put that sort of questions to the defendant, which counsel at nisi prius would put to a witness on a cross-examination. If a draftsman were to exercise no other skill in framing injunction bills than what was requisite to put the instructions into the form and shape of a bill, it would in many cases be very useless to file such bills."

"Are you of opinion that that system is often forwarded by the insertion of statements in a bill, which, if read over to a plaintiff, he could not say on his oath he verily believed to be true?"—"Certainly."

"Not requiring him to speak positively to the fact, but to his belief?"—"I have known cases where the defendant has been obliged to admit facts which the plaintiff did not expect, and would not therefore have sworn to in any form of oath."

"Has it not occurred to you in your experience, that when a case of facts, from whence a fraud was intended to be deduced, has been brought to you, to draw a bill, the context of the circumstances have suggested to your mind material circumstances which the instructions did not suggest, which you have thought it probable the transactions contained, and therefore have inserted them, and has found that the circumstances have come out so?"—"That question, if thrown into the form of an answer, would well express what I have intended to say, in answer to the several questions put to me upon the subject."

"The experience of the Chancery draftsman from certain transactions, in which he has been concerned as counsel, has taught him to expect the same circumstances of fraud, and he has therefore inserted them?"—"Certainly; and which the plaintiff therefore of course could not swear to."

"And never had an idea of them till the draftsman himself suggested them?"—"Just so; for the greatest use that a draftsman can be to his client is, in introducing such allegations."¹

Since this evidence was given, the acts called Sir Edward Sugden's Acts have passed. By those Acts the use of petitions has been substituted in certain cases for the use of bills; in other words, the interrogatories have in many instances been erased from the bill. Probably there remain some other instances in which the same change may advantageously be made; but we quote from the same report the following opinion of Lord Langdale, as showing that in his opinion the interrogatories perform very important functions:

"Do you conceive any limit would be imposed by rule on the

¹ Chancery Report, p. 353.

liberty of interrogation, or that it must be left absolutely to the discretion of the pleader?"—"I hardly know how to answer that question; whether it should be left absolutely to the discretion of the pleader. In many cases interrogatories are placed in a bill, where they are not at all necessary. I conceive the rule to be, that if the plaintiff prays generally that the defendant may answer the bill, the defendant answers sufficiently, if he answers in the very words of the statement; but if interrogatories are added to the stating part, they inquire after the same facts with certain variations, and the defendant is compelled to answer to those variations, in consequence only of the interrogatories. Now if the plaintiff should have mistaken the simple state of the fact in his bill, he might be defeated altogether in the discovery he wants, unless he added the interrogatory. At present a perfect discovery cannot be enforced without having both statement and interrogatory. Whether that state of things is absolutely necessary, is more than I will venture to say; because it appears very strange in cases where the plaintiff is conscious, that he knows nothing about the matter, and in fact only files a bill for the purpose of obtaining information from the defendant, that he sets out by stating a supposed case, and alleging with great precision that the facts are as he states them. The statement may be a work of the imagination; but the form of pleading is such, that in a case where a discovery is wanted, the plaintiff lays a foundation for his discovery by assuming a knowledge, and pretending to inform the Court how the fact is; and he then requires the defendant to say whether the fact is not so, or how it is."¹

The perusal of these opinions, delivered by men of the first eminence, and the comparison of them with the short anathema of the late Chancellor of Ireland, cannot fail to give rise to general astonishment. It will be asked on the one hand, whether practitioners in Courts of Equity are so bigoted to their own rules as to imagine advantages which do not exist, and dangers which never can arise. If the system is faulty, the faults ought to strike with peculiar force those who come in contact with them the most frequently. Practitioners of inferior station may profit by prolix pleadings and an accumulation of documents, leading to an accumulation of fees. Such, however, is not the case with leading counsel. Their profits lie in the power of giving safe opinions, of making lucid

¹ Chancery Report, p. 153.

statements of a case, of arguing with ability. They never receive a satisfactory compensation for the study of a maze of papers unnecessarily long, or for the toil of casting rubbish aside, while they are in search of valuable matter. If they are induced to give undeserved praise to the present system of equity pleading, they certainly are not blinded by self-interest. On the other hand, if these men of experience are to be trusted, how is Lord Campbell's speech to be accounted for? And can his statement of Lord Cottenham's opinions be correct? That Lord Cottenham, whose administration of his Court has attracted such peculiar attention, should entertain this opinion without ever himself divulging it, is most improbable. He has never encouraged prolix statements or pleadings of unnecessary length; but on the other hand he has been more rigid than almost any of his predecessors in compelling counsel, as to both bills and petitions, to adhere closely to the words of the record.

Had Lord Campbell stated it to be Lord Cottenham's opinion, that the bill should contain a complete statement of the plaintiff's case, *and no more*; we should have supposed that some communication upon the subject might have taken place between the two learned lords; but Lord Campbell's expression leads us to believe, that he has had no communication of this kind, and that he has been totally deceived as to Lord Cottenham's opinions. Those who are in the habit of attending Lord Cottenham's Court, affirm it to be his constant remark, "Let us look to the record." Few chancellors have done so much as he has done to introduce amongst equity draftsmen a very strict attention to the record; a circumstance which renders Lord Campbell's remark peculiarly unhappy.

We will offer a few instances of the rigid adherence to the purport of the record, which have occurred in the different branches of the Court of Chancery, while Lord Cottenham has been presiding.

In *Hammond v. Messenger*, it was argued upon demurrer, that if a defendant admits that he has alleged that he has obtained a fraudulent release of a debt, he must be taken to have admitted the fact alleged;¹ but, said the Vice-Chancellor, "A

¹ *Hammond v. Messenger*, 9 Sim. 335.

statement that a party alleges a certain thing to be so and so, cannot be considered as a positive statement that the thing is so and so." In *Steed v. Calley*,¹ an attempt was made to rely upon certain expressions attributed by a witness to one of the defendants. Lord Langdale observed, "As those expressions are not charged in the bill, as, under the circumstances, I think they ought to have been, I do not dwell upon them."

Again Lord Langdale observes in *Jones v. Wyse*,² "Upon the question of insolvency, after a careful perusal of the evidence, I think that it is to some extent, but not conclusively proved. The evidence consists in some degree of the letters and admissions of the defendant; and as those letters and admissions are not charged in the bill, the defendant has had no opportunity of explaining them, if they admit of explanation."

It is scarcely doing justice to Lord Cottenham to quote any one particular expression in proof of his close attention to the record; we rather refer to the general tenor of all his judgments. They all turn upon this careful consideration of the pleadings. It may, however, be worth while to insert the following passage, in which he distinguishes the effect of a party's statement of facts from that of his statement of legal consequences: "It is a rule of pleading that, although a party is bound by the facts which he states, he is not bound by his statement of the legal consequences of those facts. It is for the Court to judge what are those legal consequences. Whether he states that he is advised that such and such are the legal consequences, or whether he states supposed consequences, without saying he is so advised, I cannot be of opinion that a party is bound by any statements which he may make of the legal consequences arising from the facts stated."³

Since the foregoing observations were written, Lord Cottenham, with the assistance of the Master of the Rolls and the Vice-Chancellor, has published his new orders. We shall presently give a general statement of their purport. We mention them in this place merely to point out to our readers that they show the difference between the opinions of Lord Cottenham and those of Lord Campbell upon the proper mode of making reforms in Chancery. The expressions used by Lord

¹ 1 Keen, 641.

² 2 Keen, 292.

³ *Brown v. Nevill*, 2 M. & C. 376.

Campbell leave no doubt that he is prepared to abolish the interrogating part of a bill. Not so Lord Cottenham. He is so far from abolishing it, that in the 16th, 17th, 18th and 19th of these Orders, he sets forth rules regarding the frame and use of it. He treats it as a mode of obtaining evidence. He abolishes it, where evidence is not required. But where evidence is required, he makes the application of the interrogatory requisite with just as much precision as heretofore, and in a manner which is calculated to render the defendant unusually attentive in the frame of his answer.

One other remark arises upon these new orders, that, although they curtail many parts of the pleading, they contain no hint that a charging part of a bill is unnecessary, or that the stating, and charging, and interrogating parts can be treated as the threefold repetition of the same story. With a view to undeceive the world as to Lord Cottenham's opinions, the publication of these orders takes place at a fortunate moment. It proves that Lord Campbell's wild notions upon alterations in pleading are not adopted or consented to by Lord Cottenham; but that, on the contrary, they are openly and distinctly repudiated at the moment when they are fresh in the recollection of every pleader in English or Irish Courts of Equity.

But to return to Lord Campbell. His lordship, one of the most distinguished of our common lawyers, took his seat upon the bench of a Court of Equity, and forthwith delivered an opinion upon equity pleading, which is at variance with the opinions of the ablest practitioners at the equity bar, and appears, upon a fair examination, to be utterly inconsistent with the principles upon which proceedings in equity are conducted. He represented three portions of a bill, of which the functions are distinct from one another, as absolutely identical. He suggested for proposed amendments a principle which, if carried into action, would increase the length of suits, by himself considered too long already, and would add new causes of uncertainty to trials which ought in every step to be certain, definite and clear.

No wonder that the inquiry is commonly made, how a lawyer of Lord Campbell's reputation could fall into so great an error? Barristers, accustomed to practise in Courts of

equity, will readily suggest the cause of these blunders. They will allege Lord Campbell to be one of many instances in which eminence has been attained at common law, without any knowledge of equity. They will remember a mistake committed by Lord Brougham, on his first occupation of the woolsack, when, upon informing Sir Edward Sugden that he had read all the depositions in a cause, and that he was perfectly acquainted with the facts, he was surprised to hear from the learned pleader before him, that he had read a great deal of matter, on which he would not be required to adjudicate. In short, they will find in Lord Campbell's speech, a new proof that they have good reason to complain, when the president of their Courts is selected from the common-law bar.

It is not denied that some of the most eminent chancellors have come from that bar; yet if their conduct in the commencement of their career could be correctly ascertained, it would perhaps be found that at that time they committed numerous mistakes prejudicial to the suitors of the Court. Lord Hardwicke and Lord Eldon, who both were barristers at common law, are remembered with profound respect and admiration; but these examples are not applicable to our time, because they were labourers in the profession before it became divided, as distinctly as it is at present, into two separate branches. We are aware that, upon certain occasions, able lawyers of the other bar are brought into the Court of Chancery for the purpose of arguing particular questions. But, generally speaking, those questions are either difficult questions of fact, or important points of law, which imply no acquaintance at all with the pleading or procedure of a Court of Equity. The Lord Chancellor's duty is not merely to decide great questions of this nature, but above all to regulate and to preserve uniform the daily practice of all departments of his Court, to make such orders and decisions as may prevent the suitor from being delayed unnecessarily, and may furnish him, at the smallest possible expense, with all the assistance which he is entitled to receive. A man of ability, after receiving the aid of counsels' argument, can generally, in the retirement of his closet, prepare a correct judgment upon important cases; but the power of superintending the daily

routine of the Court, of deciding correctly little points offered suddenly for consideration, the power of distinguishing an unprofitable line of argument from useful discussion, and of checking counsel in such a manner as to save the time of the public without injuring the interest of the suitor; these portions of the judicial faculty, in the absence of which a tribunal is seriously defective, cannot be acquired except by the painful and laborious apprenticeship of practice in the Court of Equity.

No one acquainted with the Court can fail to appreciate the enormous benefits which have arisen from Lord Cottenham's elevation; yet it will probably be agreed, that it is not so much his natural powers, as his vast experience and his education in equity practice, that have raised him above his rivals and placed him in the highest class of chancery judges. On being appointed Master of the Rolls, he was not obliged, like some of his predecessors, to learn the practice which it was his duty to regulate; suitors were not doomed to suffer, while he learnt from the barristers before him the lesson which it was his duty to teach; he was able at once to prove himself competent for the task which he had undertaken, and to be in fact, as well as in theory, the master of his Court. And why? Simply because his noviciate had long since terminated; he had spent his life in studying and practising before equity judges, and thus had acquired the powers which equity judges ought to exercise from the first moment of their elevation.

Such are the causes to which those who practise in Courts of Equity will probably attribute Lord Campbell's unreasonable remarks. "*Ne sutor ultra crepidam*" is a principle which may be applied not merely to the inferior but also to the highest walks of society.

We cannot conclude without observing that, if these remarks are correct, they lead to the inference that this great post of our profession ought to be forbidden ground to common lawyers. Such certainly is the case. If, however, it is supposed that such a rule is unjust to common lawyers, there remains a question whether the alleged injustice does not proceed from the faulty constitution of the office, rather than from any other

cause. It is asked, whether a common lawyer who has obtained the first place amongst barristers, and in his parliamentary career has established the highest reputation for knowledge of constitutional law, is to be forbidden the first place upon the bench, because he has not practised in a Court of Equity? This question may be answered by the introduction of another, namely, whether the principal judgeship in equity ought to be a more exalted post than the principal judgeship at common law; whether, in point of fact, suitors must not be sacrificed to party, if the chief judge in equity is to be not merely the ruler of his Court, but also a leading member of a political party? Into this field of discussion we have not at present any room to enter, but it must be remembered by those who pay attention to our judicial proceedings, that, if the choice of chancellors is necessarily to fall upon great political characters, it must sometimes rest upon incompetent judges.

There is another mode of answering the question, which seems to us still more satisfactory. It is, that matters of this kind are to be decided not by the convenience or advantage of different members or classes of our profession, but by the good of the public, that is, the suitors. To the public we take it to be matter of trifling import, whether the highest premium is attainable by the whole or by only a part of the profession. No doubt the public would suffer, if the premiums of the several departments were not sufficient to ensure in all of them the exertion of adequate abilities; but if these adequate abilities are secured in their full exercise, the public interest is satisfied, and the remaining considerations are narrowed to individual advancement and to the gratification of individual ambition. Even then, if such an objection as we have mentioned were to be raised by any member of the common law bar, we should not think it entitled to any serious attention.

But the propriety of separating the judicial and political functions of the Lord Chancellor is far too grave a question for a discussion merely incidental.¹ It will probably be debated at length in the course of the next session of parliament.

¹ See 15 Law Mag. 128.

The new Orders in Chancery (Aug. 1841) will materially affect persons who, as practitioners or suitors, are in any way connected with the Court. We therefore think that a sketch of the general purport of these Orders will not be unacceptable to our readers. We will mention them according to their connexion with one another by reference to the same subject.

1, 2, 3, 4, 5.—These five first orders facilitate the delivery of documents, which it is not necessary to deliver to a party in person. With this view the names and addresses of all solicitors are to be entered in a book; at the place of address, which must be within a district strictly defined, the delivery of the documents is to be made. If a party sues in person, his address must be entered in a similar manner. A provision is made for the delivery of these documents by the post, or by publication in the Six Clerks' Office, when the object of the orders would be frustrated, if such a delivery were not held sufficient.

6.—This order¹ takes away from the course of the Court's process the writ of attachment with proclamation and the writ of rebellion. It thus diminishes the number of expensive delays, by which a party may be embarrassed who is carrying the orders of the Court into execution.

7, 8.—By these two orders the necessity of using process to compel a defendant to enter an appearance is removed. It is provided, that when a defendant who has been served with a subpoena omits to appear, the plaintiff shall be at liberty to enter an appearance on his behalf, and shall be allowed to prosecute the suit, as he could have done, if the appearance had been entered by the defendant himself.

9.—This order curtails still further the process of the Court. It relates to the attachment, which issues against a defendant for want of an answer. If the Court is satisfied that the writ has issued into the proper county, and that due diligence has been used in the attempt to serve it, then, upon the sheriff returning *non est inventus*, a writ of sequestration is to issue without any intermediate process.

14.—This order provides that the subpoena to appear and

¹ We do not understand why this order was not united with the tenth order.

answer shall contain a statement of the consequences which await the defendant if he omits to obey the writ.

10, 11, 12.—These orders shorten the process by which obedience is enforced to the orders of the Court. There is to be no necessity for the writ of execution or for the writ of attachment. The order will contain a warning of the consequences of disobedience ; and if the party who is served omits to obey, the final process will immediately follow.

13.—If a decree is made for a delivery of possession and is not complied with, it will be at once enforced by the writ of assistance.

15.—When process is issued for or against a person who is not a party, it is to be enforced by the same process which would be employed if he were.

16, 17, 18, 19.—These orders contain important alterations in the interrogating part of a bill. The rule has been that the defendant must answer all the matter contained in the bill, whether interrogated to or not. Under this rule the defendant has sometimes been entrapped into giving an insufficient answer, merely because particular matter has not been interrogated to. The sixteenth order cures the evil by confining the necessity of an answer to the interrogatories contained in the bill.

The answer is still further limited by the other three orders. The plaintiff is hereafter to number the interrogatories, and to point out which of them are to be answered by each particular defendant ; and defendants are to confine their answers according to this requisition of the plaintiff. It may easily be seen how greatly answers will be diminished in length by this alteration. Generally speaking, the long statements of ignorance, which now are frequent, will be unnecessary.

20.—By this order the extended period allowed for answering in a country cause, beyond that which is allowed in a town cause, is abolished.

21, 22, 33.—We have seen that the ninth order assists the plaintiff in compelling the defendant to put in his answer. There are however cases in which the plaintiff, having complete proof in his possession, can prosecute his suit successfully without any answer at all. In such cases discovery

may be convenient, but it is not indispensable. Yet the old practice has compelled the plaintiff to wait in all cases till the filing of the answers, and has thus conferred upon the defendant the benefit of all the delays, by which the filing of it may be postponed. Under orders twenty-one and twenty-two the Court receives power to remedy this evil. It may, upon being satisfied that the subpoena has been duly served, enable the plaintiff to continue his proceedings, although no answer has been filed; and under the thirty-third order it has the same authority in those cases in which a defendant omits to answer after his plea or demurrer has been overruled.

23, 24, 25, 26, 27, 28, 29.—The object of these orders is to diminish the expense and delay which arise from the number of the parties who are required in a suit in equity, according to the existing rules. There are many of these parties against whom no relief is prayed; yet they are served with copies of the bill: they put in their answers, and take part in all the most important proceedings of the suit, just as if they had a strong interest in the result. With respect to persons of this description, it is provided by these orders that they shall receive copies of the bill, and thus be informed of the precise nature of the suit. But it is not to be a necessary consequence that they shall therefore incur or create any trouble or expense. If they choose to take a part, they may do so, either in the ordinary way as parties, or else merely as receiving notice of the various proceedings; but then they will be liable to costs. The plaintiff also may treat them as substantial parties, but then he must incur a similar liability. Infants do not fall within the scope of these orders, apparently because they are unable to judge how far their interests require them to take part in the proceedings. We may observe, amongst many benefits which will arise from these alterations, a saving under that formidable head, "Costs out of the estate."

30.—When a testator appoints a devisee in trust with plenary powers, he intends to give him powers corresponding with those of his executor. If however a suit in Chancery is instituted concerning the realty devised, the *cestuis que trust* as well as the devisee are necessary parties; while in suits affecting personalty the legatee need not be made a party

with the executor. By the thirtieth order the devisee in trust is placed, in this respect, upon the same footing as the executor. The Court may however at the hearing direct the cestui que trust to be made a party.

31.—This order establishes the right of carrying into effect the trusts of a will affecting real estate, without making the heir a party.

32.—This order makes a great alteration by enabling a plaintiff to sue some of a number of persons liable to a joint demand in the absence of others.

34, 35.—These orders fix the time during which the plaintiff may deliberate whether he will argue a plea or demurrer; twelve days as to a demurrer to the whole bill; three weeks as to a plea to the whole bill, or as to a demurrer, or plea to part of a bill.

36, 37, 38.—These orders, like the two immediately preceding, are intended to assist a defendant in availing himself of those summary objections, by which he may meet an entire bill or a part of it. For this purpose he is permitted to take such an objection by answer to any single interrogatory; and of every such objection that he takes, he may avail himself either partially or to the full amount of the protection which legally belongs to it.

39, 40.—These orders will diminish the delays which arise from the liberty to amend by making proper parties. When the defendant states a want of parties in his pleading, the plaintiff, if he does not set down the point for argument within fourteen days, will be liable to have his bill dismissed at the hearing. If the defendant omits to state the defect, he will not be entitled to delay by taking the objection at the hearing; on the contrary, he will be liable to have a decree made in which the rights of absent parties will be specially saved.

41, 42.—By the late practice a defendant, who has wanted discovery from a plaintiff, has been obliged to pay costs, if he has drawn his cross-bill merely for discovery. To avoid this obligation, he has made his bill a bill for relief. In other words, he has asked for relief of which he has no need. By these two orders he is enabled to obtain all the discovery which he requires by filing a bill of discovery, of which the

costs, like those of a bill for relief, will be subject to the discretion of the Court.

43.—This order removes the necessity of a witness's presence in Court to prove an exhibit.

44.—The practice has hitherto been, in case a defendant has made default at the hearing, to take a decree nisi. This inattention has been visited very slightly, as an opportunity for arguing the merits has been afforded by the application to make the decree absolute. By the forty-fourth order, the decree is made absolute in the first instance.

45.—This order makes it part of the common decree for the administration of the personal estate of a deceased person, to inquire whether any part of that estate is still outstanding.

46, 47.—In creditors' suits, creditors have hitherto borne two disadvantages, which have in reality been produced by the misfortunes or misconduct of their debtors. First, they have been obliged to pay the costs of establishing their debts. Secondly, they have been deprived of the interest, which they would have obtained by judgment at law, if the Court of Equity had not interfered. These two disadvantages are removed by the 46th and 47th orders.

48, 49, 50.—By the operation of these three orders records will be greatly curtailed. In the reports of Masters, many documents, now recited at length, will be identified by reference: in bills of revision and supplemental bills the statements of the pleadings in the original suit will, generally speaking, be omitted. In petitions of rehearing, it will not be necessary to state any proceedings anterior to the order appealed from.

Those of our readers, who have followed us through this brief statement of the purport of the new orders, will perceive that their general object and tendency are, to prevent vexatious delays, unnecessary expense, and proceedings not really required by the occasion; to increase the prospect of bringing litigation to a speedy issue; to facilitate the prosecution of the suit from its commencement to its termination; to throw expense, not duly created, upon those who cause it; to deprive suitors of unfair advantages, and to check tricks and contrivances, which bring as much discredit upon the Court and practitioners, as mischief and heart-burnings upon the suitors.

Such are the general objects which these orders are intended, and, as we believe, well calculated to promote. They are evidently the fruit of careful study, long experience, and jealous scrutiny into different departments of equity business: and they are framed in the true spirit of improvement, to strengthen the sound parts of the system by removing the parts which are unsound. We look forward to further alterations; but we accept with gratitude this instalment of Chancery reform, and rejoice that it has been accomplished upon such principles as to supply a model for fresh ameliorations.

Before we close this article, we venture to make some remarks upon the effect which these Orders will produce upon the barristers and solicitors who practise in Courts of Equity. They will impose upon them the necessity of increased labour in pleading. For instance, counsel for the plaintiff must consider, not only who are necessary parties, but against whom individually relief is to be prayed, what interrogatories are to be put to each of them, and to what extent the suit shall be prosecuted against them. Counsel for the defendant must determine whether his client should allow the suit to be prosecuted in his absence, or how far he ought to take a part; whether a discussion should be raised as to parties, or the chance should be taken of a decree being made in the present state of the record; whether the different interrogatories are open to plea or demurrer, and if so, to what extent discovery ought to be resisted.

We mention these as some of the points to which equity draughtsmen must hereafter pay attention. It is obvious that in proportion as more precise pleading is required from the draughtsman, more exact information must be collected and supplied by the solicitor. We will add that, to both one and the other, the change ought to be satisfactory; for although there must be increased exertion of the mind, there will be less labour of a mere manual and unintellectual character, and less dispute upon insignificant points: parties will come more speedily than heretofore to the substance of the litigation, and in the *bonâ fide* struggle will be far less embarrassed by technical difficulties.

Such is the general character of the Orders, which Lord Cottenham, on quitting office, has bequeathed to the pro-

fession. We might have taken this opportunity of speaking of his judicial career in those terms of admiration in which lawyers of all political opinions unanimously concur. We might have spoken of his legal knowledge, assiduity, patience and uniform urbanity ; of his impartiality, not merely as between suitors, for that species of impartiality is a quality common to all English judges, but of his impartiality as between counsel, a far rarer quality, and of his attention to the youngest member of the bar, given as readily as to the most distinguished of her Majesty's counsel. We might have quoted numerous instances in which he has not contented himself with settling the one point in issue, but has endeavoured to declare the rule of law so clearly and comprehensively, as to prevent litigation for the future. And we might have truly said, that, while he occupied the chief post in the profession, every member of it felt confident that as new cases arose, they would be determined with a steadiness and uniformity of principle which could give strength and consistency to our entire system of law and equity. But the true commendation of a good public servant is to be found in labours undertaken for the public good. On this principle we have preferred, as a tribute to his lordship's merits, a brief explanation of the purport of these Orders. In them we see the fruit of long experience and professional exertion ; of enterprise in the work of improvement, and of anxiety, not merely to give judgment according to law, as it is, but also, in the imperfect parts of the law, to make it what it ought to be.

C.

ART. II.—NOTICES OF EARLY ENGLISH LAWYERS—BRACTON,
GASCOIGNE, FORTESCUE, AND LITTLETON.

WHILST our Gallery of legal dignitaries who have adorned the last two centuries is advancing towards its completion, it may not be amiss to fill a few vacant spaces with slighter sketches of some of the earlier worthies of our profession—the Fathers of the common law—whose names many are accustomed to pronounce with a kind of mystical reverence, but of whose personal career, or their concern in the events of the times in which they lived, few, probably, have a very intimate knowledge. We here assume in no degree the office of expositors of their works, but merely that of chroniclers, so far as the materials are open to us, of their personal and professional history.

First at once in antiquity and veneration stands the name of

BRACTON.

Of this eminent jurist, the first who reduced the unwritten laws and customs of England—the ill-defined and ill-understood compound of Roman, Saxon and Norman institutions—into an orderly and methodized system, we have but scanty notices. According to the authority of Sir William Pole, in his “Description of Devonshire,” cited in Prince’s “Worthies of Devon,” Henry de Bracton was a native of that county, and was probably born in the parish of Bracton or Bratton, near Oakhampton, about the close of Richard the First’s reign. He was of the university of Oxford, where he took the degree of LL. D. He early applied himself to the study—then indeed a difficult and laborious one—of the laws of England; including under that title as well the whole frame of civil and ecclesiastical jurisprudence, as that which was then beginning to incorporate itself into our judicial and administrative system, under the title of the “common law” of England—the law of custom and tradition.

He became in course of time eminently conspicuous for his legal knowledge. In the year 1244 (29 Hen. III.) he was appointed one of the king’s “itinerant justices,” or justices in eyre, for the counties of Nottingham and Derby; and he discharged the same office, in other parts of the kingdom, in several subsequent years. In 1253 the king granted him,

by writ, the use of the town mansion of William de Ferrers, Earl of Derby, then in wardship to the crown, to serve him for his residence during the nonage of the infant heir of that earl. It is affirmed by Leland that he attained the office of Chief Justice of England, and held it for a period of twenty years, until his death. His name does not, however, occur in the list of chief justices given by Dugdale: but this has been accounted for by supposing the omission to arise from the many mistakes made in the earlier documents as to his surname. Bishop Nicholson (*"English Historical Library,"* part iii. p. 139) says he finds him, in the records nearest his own time, called "Bratton," "Bretton," "Briton," "Britton," and "Brycton." Some portion of this uncertainty is alleged to have arisen from the circumstance of his giving his great work (according to Leland, who himself calls him "Brachedunus," not "Bractonus") the title of "Brito." In the series of itinerant justices given by Dugdale, we find him called, under the date of 1244, "Henry de Bracton;" in the following year, "Henry de Bractone;" in several later years appears the name "Henry de Bathoniâ" or "Batonîâ;" this last occurs in the year 1260, in which also we find, in the same list, "Henry de Bretton;" and in the column appropriated to justices of the Court of King's Bench, a notice that "Henricus de Bathoniâ defunctus est." The latter appellation, therefore, could hardly belong to Bracton, who may almost with certainty be affirmed to have lived to a later period than this.

The great monument of Bracton's legal fame, his Treatise "*De Legibus et Consuetudinibus Regni Angliæ*," must certainly have been written after the year 1262, since it refers to records of that date (unless these can be supposed to have been additions of a later hand), and as certainly before 1267, the date of the Statute of Marlebridge, to which the work contains no reference. His main incentive to the composition of it, according to his own report, appears to have been the instruction of his less accomplished brethren on the bench. "There are in England," he writes, "many and different customs, according to the difference of places; for the English have very many things of custom, which they have not of law; as in different counties, cities, boroughs, and vills, where

it will always be a subject of inquiry, what is the custom of that place, and how they who allege the custom enjoy it. But since laws and customs of this nature are often drawn into abuse by foolish and unlearned persons, who ascend the seat of judgment before they have learned the laws, and they who rest in doubt and in opinions are often perverted by the superiors ('majoribus') who decide causes rather by their own will than by the authority of the law; for the instruction at least of the inferiors ('minorum'), I, Henry de Bracton, have applied myself diligently to search out the ancient judgments of upright men, their acts, counsels, and answers, and whatsoever I found there worthy of notice, reducing it into one body, under the order of titles and paragraphs, by the aid of writing, to be commended to perpetual memory."

Although very much of the learning amassed in this work has of course become obsolete or useless,¹ still it continues to be daily referred to, both by lawyers and historians, as the authoritative exposition of the customary law of England, in relation to the rights as well of persons as things, upon many points both of civil and criminal procedure, and as the great fountain of all subsequent authorities. It was first printed in the year 1569, under the charge of an editor who designates himself "T. N.," and who deemed it necessary, in those days of burning zeal against popery, to devote a considerable portion of his preface to an apology for the author's admission of the papal authority in the reign of Henry the Third! The work, he says, "was composed in the time of King Henry the Third, about 300 years ago, not long after King John took the crown from his head and delivered it to the pontifical legate, and surrendered himself to the power of the pontiff; whence the Roman pontiff, besides his general prerogative, which he exercised with the utmost haughtiness over all the princes of the Christian world in Europe, to their signal injury and shame,

¹ If the classification of the different kinds of actions by Bracton was according to the actual practice of his time, and was not rather a fanciful classification of his own, derived from the terms of the civil law, we have departed widely indeed from them both in name and form. For instance, among the actions "in rem" (i. e. relating to land) stated by him, he enumerates a certain "*actio negatoria*," which appears to be what we should now call trespass with a justification of a right of way: "*Actio negatoria est, quam dominus fundi interdit adversus te solitò euntem per fundum suum, dicens tibi non esse jus ire per fundum suum.*"

thenceforward claimed a peculiar jurisdiction in England. It is therefore not greatly to be wondered at, that this writer, in ecclesiastical causes, appears to be compelled to admit the authority of the pope, to whom from time to time even the most invincible emperors and kings were obliged to submit."

Lord Hale, in his "*History of the Common Law*," bears this high testimony to the value of Bracton's labours: "We have likewise" (besides the charters and statutes) "two other principal monuments of the great advance and perfection that the English laws attained to under this king (Henry the Third), viz. the tractate of Bracton, and those records of pleas, as well in both benches as before the justices itinerant, the records whereof are still extant. Touching the former, it yields us a great evidence of the growth of the laws between the times of Henry the Second and Henry the Third. If we do but compare Glanville's book with that of Bracton, we shall see a very great advance of the law in the writings of the latter over what they are in Glanville. It will be needless to instance particulars. Some of the writs and processes do indeed in substance agree, but the proceedings are much more regular and settled, as they are in Bracton, above what they are in Glanville. The book itself in the beginning seems to borrow its method from the civil law; but the greatest part of the substance is either of the course of proceedings in the law known to the author, or of resolutions and decisions in the Courts of King's Bench and Common Pleas, and before justices itinerant; for now the inferior courts began to be of little use or esteem."

To this we will add the well-written eulogium of Mr. Reeves,¹ as conveying a more methodical epitome of the work: "The great ornament of this reign is the treatise '*De Legibus et Consuetudinibus Regni Angliæ*,' which has been so often quoted. Bracton's book, compared with that of Glanville, is a voluminous work. The latter is little more than a sketch, as far as the plan of it goes, and that is confined to proceedings in the king's Courts; but the former is a finished and systematic performance, giving a complete view of the law, in all its titles, as it stood at the time it was written Consistently with the extensive-

¹ *History of English Law*, ch. 8.

ness and regularity of the plan, the several parts of it are filled with a copious and accurate detail of legal learning. The rules of property are explained; the proceedings in actions, through the minutest steps, are investigated and developed; while every proposition is supported by some fair deduction, or corroborated by the authority of some adjudged case; so that the reader never fails of deriving instruction or amusement from the study of this scientific treatise on our ancient laws and customs. If the matter of this book is more instructive and entertaining than Glanville, the access to it is rendered more easy by the style in which it is written. This is infinitely superior to Glanville, and much beyond the generality of writers of that age; being, though not always polished, yet sufficiently clear, expressive, and nervous. The excellence of Bracton's style must be attributed to his acquaintance with the writings of the Roman lawyers and canonists, from whom likewise he adopted greater helps than the language in which they wrote. Many of those pithy sentences which have been handed down from him, as rules and maxims of our law, are to be found in the volumes of imperial and pontifical jurisprudence. The terms and phraseology of those two laws are borrowed by him to express the meaning of our municipal customs; and many points of law and practice are adopted from them. The familiarity with which Bracton recurs to the Roman code, has struck many readers more forcibly than any other part of his character; and some have thence pronounced a hasty judgment upon his fidelity as a writer on English law. But the passages to which such persons take exception, if put together, would perhaps not fill three whole pages of his book; and upon a second consideration of those places where the Roman law is stated with most confidence, it will seem to be rather alluded to for illustration and ornament, than adduced as an authority. In after-times he continued the great treasury of our ancient jurisprudence; where the rudiments of the law were to be traced in their first formation; where were to be seen the origin and sense of certain notions and principles, the reason of many rules of property and practice, which had become obscure by the change of times; with the causes that led to the framing of many ancient statutes, which would be unintelligible without the help of this author. Thus was Bracton deservedly

looked up to as the first source of legal knowledge, even so low down as the days of Lord Coke, who seems to have made this author his guide in all his inquiries into the foundation of our law."

It is worth remarking, that some passages of Bracton's work were quoted by the Commissioner Bradshaw on the trial of Charles I., and more copiously by Milton in his "*Defensio Populi Anglicani*," as justifying the resistance to and condemnation of that monarch. The passages cited, however, appear to be no more than a general exposition of the constitutional doctrine, essential to the very nature of a limited monarchy,—that the king is bound to govern according to law, expressed with a little unnecessary energy of diction; e. g. "the king ought to use the power of law and right as God's minister and vicegerent; the power of wrong is the devil's, and not God's; where the king turns aside to do injustice, he is the minister of the devil."

It is probable that Bracton did not long, if at all, survive the accession of Edward I. Holinshed does not mention him in his list of learned men who flourished in that reign. We have no account of his family or descendants. Prince conjectures that the line may have terminated in an heiress, who intermarried with the family of Cary, as he finds the arms of Bracton quartered with those of Lord Hunsdon.

GASCOIGNE.

It is impossible to prosecute our inquiries into the history and institutions of England during the middle ages, without being forcibly struck with the great superiority of the judicial character in that which we are accustomed to regard as a semi-barbarous age, over that of a much later period, when, under the last Stewarts, notwithstanding the great advance of knowledge and civilization, the national character was lamentably deteriorated, and the most prominent characteristics of the judgment-seat were a prostrate servility to the crown, and an unblushing and venal barter of the constitutional rights of the subject. The name of the Lord Chief Justice Gascoigne is, indeed, hardly known to posterity, except for the intrepidity with which—absolutely dependent as were the judges of those times upon the favour and countenance of the sovereign—he vindicated the authority of his office and the

dignity of his station, against the insolence and outrage of the heir apparent to the crown. He who could venture to

“rate, rebuke, and roughly send to prison
The immediate heir of England,”

when he presumed to

“forget his place,
The majesty and power of law and justice,
The image of the king whom he presented,”

must have been indeed well worthy to “bear the balance and the sword.” He brought, however, to the administration of the law not these merits only; he was an able and learned lawyer, as well as a just and fearless judge.

Sir William Gascoigne¹ was descended from an ancient and honourable family, which had been seated since the Conquest in Yorkshire, and possessed extensive estates in several parts of that county. Their principal residence was at Harewood, now the residence of the noble earl who bears that title, until, by the marriage of Sir William Gascoigne, the grandfather of the chief justice, with the daughter and heiress of John de Gawthorpe, the latter place became the chief seat of the family; and there it is supposed that the judge, who was the eldest son of William Gascoigne of Gawthorpe, by Alice, daughter of co-heir of Nicholas Frank, Esq., was born in or about the year 1350. He is said by Fuller to have been a student of the Inner Temple; his arms, however, are to be seen emblazoned in the window of Gray’s Inn Hall, which would seem to import that he was a member of that society. It appears from the lists furnished by Dugdale, that he became king’s serjeant in the year 1398. In the same year he was joined by the crown with several others in a commission of agency, obtained by Henry Duke of Lancaster (afterwards Henry IV.), when going into banishment, to prosecute his suits, and sue livery of any inheritance that might fall to him during his exile. The accession of that prince, in the following year (1399), opened to him higher prospects of promotion. Some little doubt appears to exist as to the precise period

¹ The name of William was so predominant in this family, that it was borne by no fewer than fifteen representatives of the family in lineal descent, most of whom were of knightly rank. Of these the chief justice was the eighth in succession.

when he was advanced to the dignity of chief justice. Fuller affirms that he was appointed to that office on the 1st of November, in the first year of Henry IV. (1399): Dugdale, probably with greater accuracy, states the date of his appointment as the 13th of November, 1401; and a reference to the Year Books shows that he continued in practice at the bar at least during the first year of the new reign.

In July, 1403, we find him nominated one of the commissioners for levying forces against the insurrection of the Earl of Northumberland; and in April, 1405, joined in a commission to treat with and accept the submission of the adherents of that nobleman, after the dispersion of their party consequent on the defeat at Shrewsbury. In the following year (1406), on the capture of Scrope, Archbishop of York, in arms against the king, Henry was desirous, in order to strike an instant blow at the mainspring of the rebellious movements, that a sentence of execution should be forthwith pronounced against the prelate, as a traitor taken *flagrante bello*. The chief justice, however, at once refused to be the instrument of an illegal judgment (for the canons prohibited any secular proceedings against an ecclesiastic, unless he were one convicted of heresy and degraded by the church), and answered to the king's requisition, "Neither you, my lord the king, nor any liege subject of your's in your name, can legally, according to the rights of the kingdom, adjudge any bishop to death." Henry, highly incensed at this recusancy, specially appointed a certain Sir William Fulthorpe, or Fulford, (a lawyer, but not in any judicial station), to pronounce sentence on the archbishop, which was carried into instant execution.

This display of independence, however deeply it displeased the king at the time, does not appear to have permanently prejudiced the chief justice in his good opinion, since he was not only continued in his office, but shortly afterwards (April, 1408) was again named upon a commission to treat with the revolted nobles.

A few years afterwards, he was nominated an umpire in a curious matter of arbitration. The Lord Roos complained in parliament against Sir Robert Thirwit, one of the judges of the Court of King's Bench, for withholding from him the possession of certain manors and commons in the county of Lincoln, and

(an odd accusation against one of the judges of the land), "for lying in wait with five hundred men to apprehend and seize the said lord." The chronicler adds, that Sir Robert confessed his fault before the king, and offering to abide by the order of two lords, the complainant's kindred; they made a long award, and further enjoined Sir Robert to make a great feast at Melton de Roos in the said county; that he should prepare two fat oxen, twelve sheep, two tuns of Gascoigne wine, with other provisions, and there assemble all such knights, esquires, and yeomen, as were his accomplices in the riot, where they should confess their misbehaviour to the Lord Roos, crave his pardon, and make him an offer of 500 marks in recompense, *which the Lord Roos should refuse, but pardon them, and partake of their dinner*, in token of their reconciliation; "and it was referred to Sir William Gascoigne, the chief justice, by the arbitrators aforesaid, to determine the common right between them." Whether he determined the legal part of the dispute as satisfactorily as the worthy arbitrators did the personal, does not appear.

It was shortly before the close of Henry IVth's reign, that the well known incident occurred to which we alluded in the outset, and which the genius of Shakspeare has gilded with poetic interest. An attendant of Prince Henry having been arraigned before the Lord Chief Justice for felony, the prince came into Court, imperiously demanded his release, and on its being refused, made an attempt to rescue him. Being opposed in this, he is said to have rushed towards the bench with so much passion and fury, that it was apprehended he was about to offer actual violence to the chief justice; who, however, encountered his rudeness with such an earnest and reverend expostulation upon his misconduct, as instantly restored him to reason and duty, and he calmly submitted to the judge's injunction that he should repair forthwith to the King's Bench Prison, and there await the king's pleasure on his offence. When the matter was reported to the king, he is said to have "returned thanks to God, that in this one example, he had given him such a judge who could minister, and a son who could obey, justice." It appears that his sense of the prince's misbehaviour was manifested by his removal for a time from the presidency of the Council.

The merit of this honourable incident has been by some writers denied to Sir Wm. Gascoigne, and assigned to Sir William Hankford, who was then a judge of the Court of Common Pleas. There is no doubt, however, that tradition is correct in this instance, and that it is rightly attributed to Gascoigne. Hankford never became Chief Justice of England, nor was it till after the accession of Henry V. that he was raised to the office of chief justice of the Common Pleas. Moreover, it appears that a small medal was struck in commemoration of the event, representing the judge in the act of reproofing the prince, which bore round the edge the inscription "Sir Wylliam de Gasquone."

Sir William Gascoigne retained his office after the accession of Henry V., but did not long survive that event, dying about a year afterwards, in the month of December, 1413. He was buried in Harewood Church, which contains a marble monument representing his effigy together with that of his second wife. He married, first, Elizabeth, daughter and heiress of Alexander Mowbray of Kirtlington, by whom he had one son, William, who distinguished himself in the campaigns in France under Henry V., and attained the honour of knighthood; and secondly, Joan, daughter of Sir William Pickering, and widow of Sir Richard Graystock, a Baron of the Exchequer, by whom also he had a son, James, who settled at Cardington in Bedfordshire. Among his descendants were Richard Gascoigne, a celebrated antiquary in the reign of James I., and Sir Thomas Gascoigne, one of the few objects of suspicion during the Popish Plot who was fortunate enough to obtain an acquittal by a jury.

FORTESCUE.

Sir John Fortescue, the learned and venerable author of the treatise "*De Laudibus Legum Angliæ*," was descended from an ancient and honourable family of that name, which had been settled in the county of Devon since the reign of King John. His own immediate parentage has been involved in some doubt. According to the authority of Prince, in his "*Worthies of Devon*," he was the second son of Sir John Fortescue, knight, captain of Meaux in France, and of the daughter and heiress of a gentlemen of the name of Norreys.

According to the statement of his own descendant, Mr. Justice Fortescue Aland, (in the Introduction to his edition of his ancestor's Discourse on the Difference between an absolute and a limited Monarchy) he was the third son of Sir Henry Fortescue, who was the only son of the Sir John Fortescue mentioned by Prince. Where he was born, or in what year, we have no precise account; but the date of his birth was doubtless shortly before the close of the fourteenth century. Bishop Tanner says, but upon what authority does not appear, that he was educated at Exeter College, Oxford. He became at the usual age a student of Lincoln's Inn, and having been called to the bar by that society, early distinguished himself as a lawyer. The lectures he delivered as *reader* of his inn are said to have attracted a crowded auditory, by reason of his great reputation both in the civil and criminal law. He has himself given us an account of the flourishing state of the inns of Court at that period; the least frequented of which he states to have contained about two hundred students, each of whom could not be maintained at an expense of less than eight and twenty pounds a year, a sum equivalent to about 450*l.* of our money.

In the year 1426, (4 Hen. VI.) he became one of the governors¹ of Lincoln's Inn, and three years afterwards filled again the same honourable office. In Michaelmas term, 1430, he was called to the degree of serjeant, and gave on the occasion an entertainment of unusual cost and splendour. His bill for the gold rings distributed by him on the occasion alone came, as he informs us, to the sum of 50*l.*, a sum equal to not less than about 800*l.* of our money! To every prince of the blood, to every duke, and to each archbishop, present at the solemnity, to the Lord Chancellor and the Lord Treasurer, were given rings to the value of 26*s.* 8*d.* each; to every earl and bishop, to the keeper of the privy seal, to each Chief Justice, and to the Chief Baron, a ring worth 20*s.*; to every other lord of parliament, every abbot, every prelate of distinction, every worshipful knight present, to the Master of the Rolls, and to every justice (of the King's Bench or Common Pleas), a ring of the value of a mark: to each baron of the Exchequer, to the

¹ The *governors*—the original of the benchers—were at that period two only in number, and annually appointed.

chamberlains, and to all the great men at Court then in waiting on the king, rings of a less value, in proportion to their rank and quality; so that, he adds, "there will not be the meanest clerk, especially in the Court of Common Pleas, but that he will receive a ring convenient for his degree."

If the acquisition of the rank of the coif was thus costly, it then brought with it a corresponding increase not only of importance, but of income: "it does not happen," says Fortescue, "that in any other country an advocate enriches himself so much by his practice as a serjeant at law."

Well might the learned brethren of the order, when doomed to see those quiet and venerable seats, in which their ancient and mystic robes alone held place, usurped by the upstart and flaunting silk (a thing, in comparison, but of yesterday), nay, invaded even by the unlicensed and presumptuous stuff—with the recollections of those palmy days of fame and profit crowding on their minds, protest against so unwarrantable an innovation! The invaders are expelled again: we trust that the defenders may not peradventure be reduced to the scanty consolation of knowing that "their right there is none to dispute," in a solitude almost as absolute as that of Fernandez.

In Easter Term, 1441, Fortescue became king's serjeant, and on the 25th of January, in the following year, he was raised to the dignity of chief justice of the Court of King's Bench, and received the honour of knighthood. He held this high office with the greatest reputation for learning and integrity, during the whole remainder of the reign of Henry VI., whose fullest favour he enjoyed, and to whose fortunes he steadily adhered. In the first parliament of Edward IV. (1461), having then fled with Henry into Scotland, he was attainted of high treason, by the same statute which was passed for the attainder of the royal family and the chief nobles of the Lancastrian party; and in the following year (May, 1462), Sir Henry Markham was appointed chief justice in his stead.

It is supposed that it was during his exile in Scotland that he was nominated by the dethroned monarch to the empty title of Lord Chancellor of England. In April, 1463, he passed into France with Queen Margaret and her adherents, and thence retired to Lorraine. In this honourable banishment he

remained many years, moving with the exiled court from place to place, as the necessities of the royal family required, filling the dignified post of (what he himself terms) a "chief councillor of state," and directing the studies of the unfortunate Prince Edward.

It was during this period, and probably not long before that prince's miserable death, that the venerable judge composed for his use and instruction his celebrated treatise "*De Laudibus Legum Angliæ*," or, as it is termed by Lord Coke, "*De politicâ administratione et legibus civilibus florentissimi regni Angliæ commentarius*;" a production which has received from all succeeding authorities the most unqualified applause. Lord Coke cites it as "being worthy to be written in letters of gold, for the weight and worthiness thereof." Somers, Holt, Blackstone, have all borne testimony to the excellence of its matter, no less than to the constitutional independence of its sentiments. Sir William Jones elegantly designates it "*Aureolum hunc dialogum—libellum, de quo dici potest id quod de fluvio Teleboâ scripsit Xenophon, μεγας μαν ου, καλος δε.*"¹ "In many of the most momentous questions," says Mr. Amos, "which have been agitated in Parliament and the Courts of Westminster Hall," (we may instance especially the Ship Money Case), "a powerful appeal has been made to the authority of this treatise; neither can the character or the situation of the author fail of imparting an additional interest to it."

The Introduction quaintly expresses (we quote throughout from the English translation) the occasion on which the work was written: "The prince, as he grew up to man's estate, applied himself wholly to martial exercises; and being often mounted on fiery and wild horses, which he did not fear to urge with the spur, made it his diversion, sometimes with his lance, sometimes with his sword, or other weapons, to attack and assault the young gentlemen, his attendants, according to the rules of military discipline; which a certain grave old knight, his father's chancellor, at that time in banishment with him, perceiving, thus accosts the prince:"—proceeding to invite him to a study of the laws of his country, by adducing the venerable authority of Moses and Justinian.

We cannot better explain the general scope and design of the book than in the words of Mr. Reeves: "The author supposes himself," in his character of Chancellor, "holding a

conversation with the young prince on the nature and excellencies of the laws of England, compared with the civil law, and the laws of other countries. He considers at length the mode of trying matters of fact by a jury, and shows how it excels that by witnesses. He informs us that some of our princes wished to introduce the civil law, merely for the sake of governing in the arbitrary way allowed by that law, which declares, *quod principi placuit, legis habet vigorem*. He then proceeds to examine some other points of difference between the civil and common law, always deciding in favour of our own; particularly in the following instances:—the bastardizing of issue born before wedlock; guardianship committed to those who could not by law succeed to the inheritance; and in the punishment of theft, no regard paid to a distinction between *furtum manifestum* and *non manifestum*. He concludes his book with a short account of the societies where the law of England was studied, the degrees and ranks in the profession; to these are subjoined some short remarks on the conduct and delay of suits.”

The early chapters of the work, wherein the author traces the supposed origin and history of the laws and constitution of England (which he refers to the settlement of the fabulous Brute, the Trojan), are, as might be expected from any production of that age, “replete with exploded opinions of philosophy, antiquated definitions of law, and strained applications of Scripture;” but when he comes practically to define the boundaries of monarchical power and popular rights, there is, as the same learned editor (Mr. Amos) observes, “an entire absence of those obscure and mystical definitions of the prerogative, which in aftertimes had such a fatal influence in preventing the king and the people from understanding and thereby appreciating each others’ rights, as being in fact their own.”

“In a treatise,” says Mr. Hallam, “professedly composed for the instruction of one who hoped to reign over England, the limitations of government are enforced as strenuously by Fortescue, as some succeeding lawyers have inculcated the doctrines of arbitrary prerogative.”

It appears indeed hardly credible, that more than two centuries after the period when the passage we are about to cite was deliberately stated, from the highest legal authority, as

containing the true principles of English monarchy, another Chief Justice should have been heard solemnly to declare that "the laws of England are the king's laws, and that therefore it is the inseparable prerogative of the kings of England to dispense with them !"

Very different are the doctrines propounded by the venerable Chancellor: "The king," he declares, "can neither make any alteration or change in the laws of the realm without the consent of the subject, nor burthen them against their will with strange impositions." And in another place:—"As the head of the body natural cannot change its nerves and sinews, cannot deny to the several parts their proper energy, their due proportion and aliment of blood, neither can a king, who is the head of the body politic, change the laws thereof, nor take from the people what is theirs, by right, against their consent. . . . For he is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose he has the delegation of power from the people; and he has no just claim to any other power but this."

Again:—"He cannot by himself, or his ministry, lay taxes, subsidies, or any imposition of what kind soever, upon the subject; he cannot alter the laws, or make new ones, without the express consent of the whole kingdom in parliament assembled."

No language can be more explicit and unequivocal than this. So, when the author proceeds, in a subsequent chapter, to describe the constitution of parliament, and explain the binding operation of its enactments, they are stated in a manner and in terms very much the same as those in which a writer of the present day would represent them.

Another instance in which the venerable judge exhibits a no less favourable contrast to the opinions maintained and carried into practice at a much later period of our history, is in his noble and indignant protest against the use of torture. "How inhuman," he exclaims, "must that law be, which does its utmost to condemn the innocent, and convict the judge of cruelty! A practice so inhuman deserves not indeed to be called a law, but the high road to hell."

It is not our purpose to follow him through the subsequent chapters, in which he dilates upon the excellencies of the English as compared with the civil law, as well in criminal

as civil procedure—especially in the trial by jury, the power of challenge in criminal cases, the legitimation of children, the guardianship of orphans, the system of villenage, &c. &c.: all which, however, no less attest the strong root which the principles of popular right, together with a jealous regard for the secure enjoyment and transmission of property, had—contrary to the theory of Hume and other writers—already taken in all the institutions of England. “Every inhabitant,” he says, “is at his liberty fully to use and enjoy whatever his farm produceth, the fruits of the earth, the increase of his flock, and the like: all the improvements he makes, whether by his own proper industry, or of those he retains in his service, are his own to use and enjoy without the lett, interruption, or denial of any.”

He proceeds to sketch a highly interesting picture of the plenty and comfort prevailing throughout England, by reason of the security and equality of the laws. “Hence it is, that the inhabitants are rich in gold, silver, and all the necessaries and conveniences of life. They are fed in great abundance with all sorts of flesh and fish, of which they have plenty everywhere; they are clothed throughout in good woollens; their bedding and other furniture in their homes are of wool, and that in great store: they are also well provided with all other sorts of household goods, and necessary implements of husbandry: every one, according to his rank, hath all things which conduce to make life easy and happy.”

In another place he says, that “England is so thick spread and filled with rich and landed men, that there is scarce a small village in which you may not find a knight, an esquire, or some substantial householder, commonly called a frank-leyne; all men of considerable estates; there are others who are called freeholders, and many yeomen of estates sufficient to make a substantial jury. There are several of those yeomen in England who are able to dispend by the year a hundred pounds and more.”

All this comfort and opulence, in spite of a protracted civil war raging throughout the empire!¹—Alas! who now can contemplate the beautiful valleys of England, choked and blackened with the smoke of manufactories, reeking with vice

¹ See Mr. Amos's notes to these passages; and Hallam's *Middle Ages*, vol. iii. ch. 9.

and squalor, and abounding in heart-rending scenes of infant misery—her artisans rife with sullen and dangerous discontent—her prisons gorged with criminals—but must feel sensibly, in spite of all her refinements of art, and luxury, and knowledge—

“ How wide the limits stand
Between a splendid and a happy land !”

The author proceeds to describe the nature and constitution of the Inns of Court, and the judicial establishments of the country ; but our limits forbid us to follow him into these topics. The well-worked judges of our time may cast a sigh of regret towards those halcyon days, when “ the judges of England did not sit in the king’s courts above three hours in the day, that is, from eight in the morning till eleven,” and afterwards, “ when they had taken their refreshments, spent the rest of the day in the study of the laws, reading of the Holy Scriptures, and other innocent amusements, at their pleasure ; a life rather of contemplation than of much action.” “ Nor was it ever found,” the author somewhat boldly avers, “ that any of them has been corrupted with gifts or bribes.” Their incorruptibleness had its reward, he intimates, even in this world :—“ it has been observed, as an especial gift of Providence, that they have been happy in leaving behind them immediate descendants in a right line.”

The treatise “ *De Laudibus Legum Angliæ*” was received, on its first appearance, with great esteem and favour by the profession. It was first printed, in Latin only, in the reign of Henry VIII., but in what year we are not informed ; again, in Latin, with an English translation, in 1567 ; English editions appeared also in 1616, 1640, and 1672, the latter illustrated with notes by Selden. The book has since passed through several impressions, the latest being that edited by Mr. Amos in 1825, enriched with copious and learned notes upon all the subjects—political, antiquarian, and legal—to which the work refers.

The venerable author himself, on the release of Henry VI. from the Tower by the Earl of Warwick, in 1470, accompanied Queen Margaret into England, and landed at Weymouth on the very day on which the battle of Barnet was fought.

After the utter dispersion of the hopes of the Lancasterian party by the rout at Tewkesbury, Fortescue is supposed to have retired to his seat of Ebberton or Ebrighton, near Campden, in Gloucestershire, where he remained during the rest of his life in privacy and undisturbed. He was probably allowed, without molestation, to resume possession of his property there, which, on his attainder, had been bestowed upon Sir John Burgh, who died just before his return to England.

He took, indeed, some pains to conciliate the favour, or at least the forbearance, of Edward IV., by a kind of apology for or retraction of his former writings in impeachment of the title of the House of York to the crown. "He wrote a book," says Lord Coke, "in defence of the title of King Henry the Sixth, his sovereign lord and master, to the crown of England, but after, out of truth and conscience, retracted the same; both which I have: wherein he deserved singular commendation, in that he was not amongst the number of those qui suos amassent errores, but yielded to truth when he found it."

In no degree, however, did he disguise or qualify his former declared opinions as to the limitations on the power of the crown, and the rights of the subject; his treatise "Of the Difference between an absolute and a limited Monarchy," which was written after his return to England, being, as to these points, nearly a translation from his former work: a proof, as Mr. Hallam observes, that whatever particular acts of violence might occur, the principles of limited monarchy were as fully recognized in the reign of Edward IV., as they had been under the Lancasterian princes. He was the author also of many other compositions, none of any great extent, principally on political and antiquarian topics: of most, if not all of them, copies exist in manuscript in the British Museum and other public libraries.

Sir John Fortescue died in his retirement at Ebberton, having almost attained, it is said, the patriarchal age of ninety, and was buried in the church of that parish, where a monument, bearing his effigy, was raised to his memory, which, in 1677, was repaired and beautified by the then representative of his family, and a Latin inscription, in prose and verse, added, much in the usual style of such compositions. His son and heir, Martin Fortescue, Esq., had two sons,

John and William : the issue of the former failed in the next generation ; the latter was the ancestor, in a direct male line, of the Earls Fortescue, including the late noble Lord Lieutenant of Ireland.

LITTLETON.

We have but little information respecting the personal history of this great oracle of the law of real property, beyond the particulars furnished to us by his still more illustrious commentator, in the Preface to the First Institute. He was the eldest son of Thomas Westcote, a gentleman of good family in the West of England, who filled some office about the court of Henry VI., by Elizabeth, the daughter and heiress of Thomas de Littleton, lord of Frankley in Worcestershire, the representative of a family of very ancient extraction, whose ancestors had been settled in the vale of Evesham at least as early as the reign of Henry II., and derived their surname from the parish of Littleton, near that town, in which they held lands as late as the reign of Queen Elizabeth. The presence in their arms of the "three scallop shells" appears to have indicated that the representative of the family had borne arms in the Crusades, or had made a pilgrimage to the Holy Land. In consideration of the large dowry and ample possessions which the lady brought to her husband, it was stipulated in her marriage settlement that her issue should assume the name and bear the arms of Littleton. There were several children of the marriage, all of whom connected themselves with families of consideration, so that, as Lord Coke informs us, "the dignity of this fair descended family hath grown up together, and spread itself abroad by matches with many other ancient and honourable families, to many worthy and fruitful branches, whose posterity flourish at this day ; and quartereth many a fair coat, and enjoyeth fruitful and opulent inheritances thereby"—"the best head of quartering of arms," as is shrewdly suggested in the margin.

Thomas Littleton, who was, as we have said, the eldest son of this marriage, was a student of the Inner Temple. He soon acquired repute in his profession, and "read learnedly on the statute de donis conditionalibus." He attained in due course to the degree of the coif, and was appointed, somewhere about the year 1450, steward of the Marshalsea Court

of the royal household—that is, as we should now designate the office, Judge of the Palace Court. In the year 1455 (33 Hen. VI.) he was made king's serjeant, and appointed a justice itinerant, in which capacity he rode the northern circuit. Although he does not appear to have taken much part in the political warfare of that distracted period, he thought it expedient, on the accession of Edward IV., to obtain a general pardon under the great seal. In the sixth year of that king's reign (1466) he was appointed one of the justices of the Court of Common Pleas, "and then rode the Northamptonshire circuit;" and some years afterwards, he was created a knight of the Bath.

It was while he sat in the Common Pleas that he composed his famous work on Tenures, which he inscribed to, and is supposed to have been designed for the instruction of, his second son Richard, then a student for the bar, and afterwards a lawyer of eminence in the reigns of Henry VII. and Henry VIII. Lord Coke says that it was not published during the life of himself or of his son, but this is very questionable; it is probable that the earliest copy was one printed at Rouen, not long after the introduction of printing, and, although without date, most probably before the end of Edward IVth's reign. It does not appear, however, to have been cited as an authority until the publication of Fitzherbert's *Natura Brevium*, in the 26th Henry VIII. (1535). This edition was in law French, and ran on continuously. The division into sections was first introduced by West, the author of the *Symboliography*, who was a contemporary of Lord Coke. The work first appeared in English in company with Lord Coke's *Commentary*.

It is altogether needless to dwell upon the merits of this celebrated work, which Lord Coke styles "the ornament of the common law, and the most perfect and absolute work that ever was written on any human science." So high an authority had it attained in the reign of Queen Elizabeth, that in a case in the Queen's Bench, when presided over by Lord Hobart, the Court (on a question whether a release to one trespasser should be available to his co-trespasser) gave judgment according to the opinion of Littleton, "and openly said that they owed so great reverence to him, as they would not have

his case disputed or questioned." It is unnecessary to say, that the text of Littleton, and the Commentary of Coke, now alike possess the most unquestioned authority, and command the most implicit veneration.

Sir Thomas Littleton died on the 23rd of August, 1481, and was buried in Worcester cathedral, where a monument of white marble, decorated with his statue, was erected to his memory. His portrait was placed also in the churches of Frankley and Hales Owen. "He that is desirous," says Lord Coke, "to see his picture, may in the churches of Frankley and Hales Owen see the grave and reverend countenance of our author—the outward man; but he hath left this book, as a figure of that higher and nobler part, that is, of the excellent and rare endowments of his mind, especially in the profound knowledge of the fundamental laws of this realm. He that diligently reads this excellent work, shall behold the child and figure of his mind, which the more often he beholds in the visual line, and well observes him, the more shall he justly admire the judgment of our author, and increase his own."¹

He married Joan, daughter and co-heir of William Burley, of Broomscroft Castle, Salop, and widow of Sir Philip Chetwynd of Ingestre, by whom he had three sons, William, Thomas, and Richard, the lawyer already mentioned; all of whom inherited from him large possessions, and made advantageous alliances. From the eldest, William, who was knighted at the battle of Stoke, in 1487, the present noble family of Lyttelton, barons of Frankley in the English and of Westcote in the Irish peerage, are lineally descended. Among the many eminent descendants of the illustrious judge, the only one whom it falls within our province to particularize is Edward Lord Littleton, lord keeper in the reign of Charles I., a lawyer of great repute, but little deserving of respect as a politician.

¹ The former of these pictures (which adorned the window of the channel in Frankley church) has long been imperfect, having lost the head and neck. It was entire before the civil wars, and was then described in Habington's Survey of Worcestershire, as representing "a man in scarlet with a coif on his head." From it the picture by Jansen, in the Inner Temple Hall, was probably copied.

**ART. III.—ON THE CONTRACTS OF MARRIED WOMEN EITHER
AT LAW OR IN EQUITY.**

In a great commercial country like England, it is of no inconsiderable importance that the public should possess a clear knowledge of how far law or equity will lend its aid for the enforcement of contracts express or implied, entered into by married women during coverture but after separation from their husbands; for it is an undeniable fact that numerous persons have sustained serious losses for want of accurate information on this subject. Various indeed have been the questions from time to time discussed in our Courts of justice in relation to the validity of such contracts, in which discussions great learning and legal acumen have been exhibited; and it is to be regretted that the judgments on these questions, though pronounced by some of the most intelligent judges of the day, have been in direct and positive contradiction of each other. For these reasons we purpose in the following article to devote a few pages to the consideration of some of the principal cases on this subject which have received judicial investigation, more especially to two important decisions, one at common law and the other in equity, by which it may, we think, safely be concluded, that the law has at length become finally settled.

We purpose therefore to show in the first place, in what cases a married woman, though separated from her husband, cannot at law be sued on her own contracts; secondly, in what cases she may sue or be sued on her own contracts notwithstanding the coverture; thirdly, the capacity of a feme covert to bind her separate estate in equity by her own contracts.

First, in what cases a married woman, though separated from her husband, cannot at law be sued on her own contracts.

It was at one time held, and by no less authority than Lord Mansfield himself, that where a husband and wife parted by mutual consent, and the latter had a separate maintenance from the former adequate to her own support, the wife was in all such cases liable for the payment of her own debts. In an action against a feme covert for goods sold, she pleaded her coverture, to which the plaintiff replied that she lived separate and apart from her husband, who resided in Ireland, from

whom she had a separate maintenance, and therefore was liable for her own debts. This replication was on demurrer holden to be good, and the plaintiff had judgment.¹ It was also held by Lord Mansfield in a subsequent case, generally, that a *feme covert* living separate from her husband and having a separate competent maintenance might be sued alone on a contract made by her for necessities.²

The difference between the two cases referred to was this, that in the former case the husband was resident out of the kingdom when the debt was contracted, was dead when the action was brought, and the maintenance was secured by deed; whereas in the latter case the husband was resident and living in England, and the maintenance was not secured by deed; the Court however determined that these circumstances did not in point of law vary the defendant's liability in each particular case.

The principles involved in these decisions were repeatedly afterwards recognized in subsequent cases, and indeed carried so far as not only to make the *feme* liable for a debt contracted during her first coverture, but, as a legal corollary from that principle, to extend that liability even to an after-taken husband, it being said that a man takes his wife *cum onere*.³ In this case Ashurst J. remarked that it was only necessary to consider the reasons on which the incapacities of a *feme covert* were founded; not on the same ground as those of an infant, whose disabilities arise from a want of discretion; but first because she has no property; secondly, because it would be unreasonable to permit the wife to affect the property of her husband, except where he will not allow her common necessities; in which case her contracts are the contracts of her husband. Now, where a woman has a separate maintenance, and the husband cannot be charged, it follows naturally that she must; and if so, we cannot draw a precise line, and say she shall be liable for this, and not for that; for her incapacity arising from want of property being once removed, she is suable for all. But if, as was supposed, she

¹ Ringstead v. Lady Lanesborough, M. 23 G. 3, and H. 23 G. 3.

² Barwell v. Brooks, 3 Doug. 371.

³ Corbett v. Poelnitz, 1 T. R. 5; see also Ellah v. Leigh, 5 T. R. 679; De Gaillon v. L'Aigle, 1 B. & P. 357.

were only liable in respect of her separate maintenance, she could not be liable generally, but only so long as the maintenance continued; after the manner of an executor, as long as assets remain in his hands: that however cannot be, if she exhaust her own funds, it is her own folly, but does not render her less liable. If she be liable at all, she is liable generally; and that not only for necessities, but for all contracts.

Again, Lord Mansfield's reasoning is very powerful in support of the wife's liability. He says, in justice the wife in such a case ought to pay; but then to encounter this, there is a rule of positive law, which is to be adhered to and preferred, though in some particular cases it may seem productive of hardship and oppression. By this general rule, a married woman can have no property real or personal. Her contracts are entirely and universally void; for her contracts even for necessities are the contracts of her husband: she cannot be sued or taken in execution: but it has been properly said that as the times alter, new customs and new manners arise;¹ these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule. "The question then is, whether it is so here? Whether, under the circumstances of this case, a married woman should or should not be sued solely? Exceptions have been made in this case. Where a husband is in exile, or has abjured the realm, and credit has been given to the wife alone, justice says she must pay, for the husband cannot be sued. So it is in the case of transportation, though the case is not exactly the same: for there the absence is only temporary, because the husband may come over and be sued afterwards. Why then is it so established? because the wife acts as a single woman, gains credit as such, receives the benefit, and shall be liable to the loss; and where she has an estate to her separate use, in justice she ought to be liable to the extent of it. In modern days, a new mode of proceeding has been introduced, and deeds have been allowed under which a married woman assumes the appearance of a *feme sole*, and is to all intents and purposes capacitated to act as such. In the ancient law there was no idea of a separate maintenance; but when it was es-

¹ "Quicquid agunt homines is the business of courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind." Per Lord Mansfield, 3 Doug. 373.

tablished, what said the Courts? that the husband should not be liable even for necessities; and they said so, because convenience and justice require it. The only question then is, whether a married woman, but living separate from her husband by agreement, having a large separate maintenance settled on her, continuing notoriously to live as a single woman, contracting and getting credit as such, and the husband not being liable, shall be sued as a *feme sole*? I think she should,—it is just that it should be so.”

Prior to this decision it had been held that a *feme covert* having a separate maintenance could not be sued without joining her husband,¹ nor could a *feme covert* eloping from her husband and incurring debts be sued alone.²

Notwithstanding the reasons thus elaborately expounded in *Corbett v. Poelmitz*, it is clearly established, and it may be stated as a settled legal proposition, that a *feme covert* at law has no power to contract so as to sue or be sued either with or without her husband on contracts entered into by her while the relation of marriage subsists, even though she live separately from her husband and have an adequate maintenance secured to her by deed, except in the instances which we shall have occasion to notice in the second branch of this article.

This principle was first solemnly recognized in the celebrated cause of *Marshall v. Rutter*,³ after two arguments before the twelve judges in the Exchequer Chamber. Lord Kenyon in one part of his judgment pronounced in that case observed, that on account of the magnitude of the question and from respect to the authority and learning of those judges who had holden that a *feme covert* living apart from her husband could be sued on her contracts, the Court had thought it a fit case to be argued before all the judges, and the reasons on which the decision in *Marshall v. Rutter* was come to have been never shaken.

At law, therefore, a married woman has no power or capacity to contract so as to make herself liable; nor can she maintain an action of trespass for breaking and entering her house.⁴ The

¹ *Leare v. Schutz*, 2 Wm. Black. 1195.

² *Hutchett v. Buddely*, 2 W. Black. 1079.

³ *Marshall v. Rutter*, 8 T. R. 545. See also *Nurse v. Craig*, 2 New Rep. 148; *Marsh v. Hutchinson*, 2 B. & P. 226, 11 East, 301, 3 Camp. 123.

⁴ *Boggett v. Frier and another*, 11 East, 301.

disability of a *feme covert* to contract arises from three circumstances: first, for want of power to assent so as to bind herself, she having in consideration of law no will of her own, her will being by the marriage subject to that of the husband; secondly, for want of power to bind her husband; thirdly, for want of property. In legal contemplation the wife has no separate existence, *baron* and *feme* being in law but one person. *Vir et uxor sunt quasi unica persona quia caro una et sanguis unus*.¹ Notwithstanding the separation of *baron* and *feme*, the legal consequences of the marriage as they affect the wife still exist. Provided the deed of separation be valid, the husband is not liable for her debts; and if the separate allowance allotted to the wife be adequate to her support and it be duly paid, neither can the wife contract or sue or be sued at law even for necessities, and those who trust or deal with a woman so situated must rely on her honour only. So if a married woman under such circumstances hire furniture, the contract is void, for the contract to be valid must bind both parties, but the wife being married, it could not bind her; so that the lender is not divested of his present property therein, and may maintain *trover* against a third person who takes them, even an execution creditor of the husband.² Since the establishment of this doctrine it follows as a consequence, that a married woman is not liable on her contracts, though she live apart from her husband in a state of adultery, or there exist a valid divorce *à mensâ et thoro*,³ though she contract during the separation in the assumed character of a *feme sole*.⁴ Nor would the personal representative of the wife be liable under such circumstances, at least at law, though he had abundant assets.⁵

¹ Bracton, lib. 5, cap. 25; 1st Inst. 112 a. 112 b. s. 168.

² Smith v. Plumber, 15 East, 607.

³ A divorce for adultery was anciently *à vinculo matrimonii*; and, therefore in the beginning of the Reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery the parties might marry again; but in Foljambe's case, H. 44, Eliz., in the Star Chamber, that opinion was changed; and Archbishop Bancroft, by the advice of divines, held that adultery was only a cause of divorce *à mensâ et thoro*.

⁴ Fairthorne v. Blaquire, 6 M. & S. 73; Maclean v. Douglas, 3 B. & P. 128; Id. 220; Turtle v. Lady Worsley, 3 Doug. 290; Lewis v. Lee, 3 B. & Cress. 291; 5 D. & R. 98, S. C.; *sed vide* Cox v. Kitchen, 1 B. & P. 338, where the contrary doctrine was held per Buller J.

⁵ Clayton v. Adams, 6 T. R. 604.

It was also held by Lord Ellenborough,¹ that if a husband and wife separate, and he pays her an allowance for her support, he is not liable to be sued for her debts contracted for necessities, although the separation were *not* by deed and there was no written agreement between them with respect to the allowance—also, that the adequacy of the allowance was a question for the jury; and Lord Ellenborough very justly remarked in that case that the allowance must be sufficient, according to the degree and circumstances of the husband.² A wife might be willing to accept a provision wholly inadequate, because she could get no more. If a contrary doctrine were to prevail, the husband would be discharged on proof that he paid and his wife received from him 40*s.* a year; to destroy the credit the wife carries with her for suitable necessities, the husband must prove that he has *paid* her an adequate allowance. The wife's receipts are not evidence for this purpose, and whether the party trusting the wife has had notice of the allowance, is immaterial, for such notice need not be given nor proved.³

In deciding *Mizen v. Pick*, Alderson, B. is reported to have said, "I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife living separate from her husband is supplied by him with sufficient funds to support herself—with every thing proper for her maintenance and support—then she is not his agent to pledge his credit, and he is not liable."

In *Hindley v. The Marquis of Westmeath* nothing is said about notice,⁴ and this case establishes, that a party cannot recover from the husband even for necessities supplied to the wife if she be living apart from him *against his consent*, unless his conduct amount to expulsion from his dwelling: but where a husband separated from his wife, by his violent conduct renders it necessary for her to exhibit articles of the peace against

¹ *Hodgkinson v. Fletcher*, 4 Campb. 70.

² According to the Code Civil de France, the husband is obliged to furnish his wife with every thing necessary for her wants of life, according to his means and station. Article 214, chap. 6, is as follows: "La femme est obligée d'habiter avec le mari, et de le suivre partout où il juge à propos de résider: le mari est obligé de la recevoir, et de lui fournir tout ce qui est nécessaire pour les besoins de la vie, selon ses facultés et son état."

³ *Mizen v. Pick*, 3 M. & W. 481.

⁴ 6 B. & Cr. 200; 9 D. & R. 351; S. C. 1 Dow & Clark, 519.

him, he is liable for the expenses thereby incurred, although he allows her a separate maintenance.¹

*Marshall v. Rutter*² is strongly confirmed by the case of *Lewis v. Lee*.³ It was an action for goods sold, to which the defendant pleaded her coverture. The plaintiff replied that the defendant was divorced *à mensû et thoro* for adultery, and lived separate and apart from her husband. The defendant demurred to this replication, and judgment was given for the defendant. It was said that the replication was no answer to the plea, because it did not show that the defendant had ceased to be a *feme covert*; and it was quite clear if she were a *feme covert*, she could not be sued alone.

*Gilchrist v. Brown*⁴ shows that a *feme covert* living apart from her husband and in adultery cannot be sued as a *feme sole*; and the law is the same even if she live separate, and has alimony pending the suit in the Ecclesiastical Court, and obtain credit in her own name.⁵

A woman who has declared herself to be a *feme sole*, and as such has executed deeds and maintained actions, if she afterwards be sued as a *feme sole*, is not estopped from setting up her own coverture as a defence,⁶ though it seems the converse of this is not so; for where the plaintiff had hired a house of the defendant, representing herself at the time to be a *feme covert*, and upon the faith of the like representations obtained goods from various tradesmen; it was held that her assertions, that she was a *feme covert*, estopped her from suing as a *feme sole* in respect of a trespass committed by the defendant under colour of a distress for rent:⁷ and previously to the passing of the act for the abolition of arrest on mesne process, it was the uniform practice of the Courts at Westminster Hall to discharge a married woman on filing common bail, unless the plaintiff swore that at the time of entering into the contract she had represented herself to be a *feme sole*.⁸ The Court will set aside a judgment on a warrant of attorney given by a *feme covert*, although she had been divorced *à mensû et thoro*.⁹

¹ *Turner v. Rooks*, 2 P. & D. 294.

² 8 T. R. 545.

³ 3 B. & C. 291.

⁴ 4 T. R. 766.

⁵ *Ellah v. Leigh*, 5 T. R. 679.

⁶ *Davenport v. Nelson*, 4 Campb. 26.

⁷ *Longford v. Foot*, 2 M. & S. 349.

⁸ *Hollingdale v. Lloyd*, 3 Mee. & W. 418. *Slater v. Mills*, 7 Bingh. 606; 5 Moo. & P. 603; 1 Dowl. 230. But see *Walsh v. Gibbs*, 4 Dowl. P. C. 685.

⁹ *Fairthorne v. Blaquire*, 6 Maul. & S. 73.

2ndly. *In what cases a married woman may sue or be sued on her own contracts, notwithstanding the coverture.*

To the general rule of law by which it is held that a *feme covert* cannot be sued on her own contracts, some exceptions have been wisely established—exceptions indeed, which are not less beneficial to the interest of married women than they are consonant to the soundest principles of justice and public convenience. Whether a woman is to be considered for certain legal purposes as a *feme sole* or a *feme covert*, must depend in a great degree upon the effect which the common law Court will give to a real or quasi divorce *à mensâ et thoro*.

At common law a wife could not sue without her husband, except in cases where he was supposed to be *civiliter mortuus vel mortuus sæculo*. Lord Coke says;¹ “that a wife is disabled to sue without her husband, as much as a *monk* is without his sovereign, and yet we read in books that in some cases a wife hath had *abilitie* to sue and be sued without her husband;”² for the wife of Sir Thomas Belknap, one of the justices of the Common Pleas, who was exiled or banished for life beyond sea, did sue out a writ in her own name, the husband being alive, whereof,” says Lord Coke, “one said,

“Ecce modo mirum, quod fœmina fert breve regis;
Non nominando virum conjunctum robore legis.”

King Edward the Third³ brought a *quare impedit* against the Lady of Maltravers; and she pleaded, that she was covert of baron; whereunto it was replied for the king, that her husband, the Lord Maltravers, was put in exile for a certain cause; and she was ruled to answer. So also King Henry the Fourth⁴ brought a writ of ward against Sibel B., who pleaded that she was covert of baron, &c.; whereunto it was replied for the king, that her husband for a crime that he had committed against the king and the *peer*es was relegate or exiled into Gascoigne, there to remain until he obtained the king's grace; and Gascoigne, Chief Justice, *ex assensu socio-rum*, awarded that she should answer.

This doctrine however doth not extend to the wife of the King of England, as she is for most purposes a *feme sole*, though married; for “by the common law she is an exempt

¹ Coke Litt. 132 b.

² 2 H. 4, f. 7 a.

³ 10 Edw. 3, 53.

⁴ 1 H. 4, 1, b. Weyland's case, 1 Parl. Rec. 66.

person from the king, and is capable of lands or tenements of the gift of the king, (as no other feme covert is), and may sue and be sued without the king; for the wisdom of the common law would not have the king (whose continual care and study is for the public, *et circa ardua regni*) to be troubled and disquieted for such private and petty causes: so that the wife of the King of England is of ability and capacity to grant and to take, to sue and be sued, as a feme sole by the common law."¹

Lord Coke afterwards observes, "that a deportation for ever into a foreign land, like to profession,² is a civil death, and that is the reason that the wife may bring an action or may be impleaded during the natural life of her husband, for he is *extra legem positus*;"³ and so, if by an act of parliament the husband be attainted of treason or felony, and saving his life, is banished for ever, as Belknap and others were, this is a civil death, and the wife may sue as a feme sole. But if the husband, by an act of parliament, have judgment to be exiled but for a time, which some call a relegation, that is no civil death according to Coke. Yet though it is no civil death in the judgment of Coke, still for the time the effect is the same to the wife; and therefore it is equally necessary that she should have a right to sue alone.⁴ In modern times it was held that a married woman, whose husband was banished by act of parliament for life, might make a valid service, the Court being of opinion that such a banishment rendered her capable of acting in all things as a *feme sole*, and as if her husband were dead, and that the necessity of the case required she should have such power.⁵ Even where the husband had not been banished by act of parliament, but has consented to exile himself, having been convicted of felony, and afterwards pardoned, on condition that he should transport himself for life out of his majesty's dominions, that has been held to restore to his wife the capacity of a *feme sole*.⁶

¹ This was the law before the Conquest. Co. Litt. 133 a, s. 200.

² Exile and profession are now however out of the question; and even in the olden time, it is said, "*vir non potuit exuere uxorem*." Sanchez, *Disputationes de Sancto Matrimonii Sacramento*, cap. 9, *De Debito conjugali*;—where the learned reader will find some curious legal lore on the subject of matrimonial obligations and immunities.

³ 1 Inst. 130 a.

⁴ For the authorities on this subject, see 4 Vin. 152; 1 Com. Dig. 18; Carth. 149.

⁵ Countess of Portland v. Progers, 2 Vern. 104.

⁶ Newsom v. Bowyer, 3 P. Wms. 37.

When the legal existence of the husband may be considered as extinguished or suspended, that is, when he is dead in law, as in the case of transportation for life, or for a limited term, under a legal judicial sentence, a *feme covert* may contract and render herself personally liable, and may sue and be sued on her own contracts;¹ otherwise she might be subject to the severest privations, even to starvation, and it would be unreasonable that she should be remediless on her part, and equally hard upon those who had any demand on her, that not being able to obtain any redress from the husband, they should not have any against her; and so far has this doctrine been recognized by the Courts, that if a convict sentenced to transportation remain in this country (at the hulks), the wife may be sued as a *feme sole* whilst the sentence is in force,² and that she may be made a bankrupt; for where a *feme covert* may sue and be sued she may trade, and if she be competent to trade, she is subject to the same law as other traders.

By the custom of London, a *feme covert*, being a sole trader, may sue or be sued in the city Courts as a *feme sole*, with reference to her transactions in London, but the husband must be made a party to the suit for conformity;³ though if judgment be given against them, execution shall issue against the *feme* only;⁴ and such custom is pleadable in London, but not elsewhere, except so far as it may be made use of in the superior Courts by way of bar;⁵ and it has been held that a wife, being a sole trader in London, may like any other trader be made a bankrupt.⁶

In *Sparrow v. Carruthers*⁷ the wife's disability was held to

¹ *Jewson v. Read*, Lofft, 142; *Lean v. Schutz*, 2 B. & R. 1197; *Marsh v. Hutchinson*, 2 B. & P. 231; Bac. Abr. Baron and Feme (M.); *Lady Belknap's case*, Year Book, 2 H. 4, f. 7 a; 1 H. 4, pl. 12.

² *Ex parte Franks*, 7 Bingh. 762; 1 M. & Scott, 1, S. C.

³ There is an article in the Code Civil to the like effect. 215, "La femme ne peut ester en jugement sans l'autorisation de son mari, quand même elle serait marchande publique, ou non commune, ou séparée de biens." And by article 220, the wife, if she be a public trader, may, without the authority of her husband, bind herself for that which concerns her trade. "La femme, si elle est marchande publique, peut, sans l'autorisation de son mari, s'obliger pour ce qui concerne son négoce."

⁴ *Langham v. Bewett*, Cro. Car. 68.

⁵ *Beard v. Webb*, 2 Bos. & P. 98; *Clayton v. Adams*, 6 T. R. 605; *Candell v. Shaw*, 4 T. R. 361.

⁶ *La Vie v. Phillips*, 1 Wm. Black. 570. ⁷ Cited in 1 T. R. 7; 2 W. Black. 1197.

be suspended by the transportation of the husband for a term of years. In this case the married woman was the defendant; but the same principle was recognized in *Carroll v. Blencowe*,¹ where she was plaintiff, on the ground of the husband having abjured the realm, even though the term of his transportation has expired. So in *Walford v. Duchesse de Pienne*,² where the husband, a foreigner, went abroad without returning for some years. *De Guillon v. L'Aigle*³ is an authority to the same effect. But these two latter cases have been since overruled by Lord Ellenborough, in *Kay v. Duchesse de Pienne*.⁴ In *Carroll v. Blencowe*⁵ the wife of a transported felon was held competent to sue, the husband not having returned, although the term of the husband's transportation had expired; for the *onus probandi* of showing the husband's return lay on the defendant. In *Lewis v. Lee*⁶ the same point is admitted by the Court. *Ivason v. Read*⁷ is another authority to the same effect.

Where the husband, who is an alien, has never been in this country, and his wife reside here, and contract debts, she is it seems responsible;⁸ but in the case of an alien who has once resided in this country, the *animus revertendi* is, it seems, to be presumed, unless the contrary appear; and therefore Lord Ellenborough held that a woman by birth an alien, and the wife of an alien, could not be sued as a *feme sole* if her husband had lived in this country, although he had left her here, and entered into the service of a foreign state. The Court of King's Bench afterwards confirmed this case.⁹

But in the case of an Englishman, who may at any time be recalled by the king,¹⁰ and whose return is to be presumed, his residence abroad is not tantamount to a civil death, and the wife of such a man, who contracts debts in this country, is not liable to be sued, and cannot sue, as a *feme sole*,¹¹ although

¹ 4 Esp. 27, per Lord Alvanley.

² 2 Espin. 554.

³ 1 B. & P. 357.

⁴ 3 Camp. 123.

⁵ 4 Espin. 27.

⁶ 3 B. & C. 291.

⁷ Loft, 134.

⁸ *Williamson v. Dawes*, 9 Bingham. 295; 3 M. & Scott, 352; *Kay v. De Pienne*, 3 Camp. 123; *Derry v. Mazarine*, 1 Lord Raym. 147. *Barden v. Keverberg*, 2 M. & W. 61.

⁹ *Kay v. De Pienne*, 3 Camp. 123. ¹⁰ Chitty, jun. on Prerogative, 24, 25.

¹¹ *Marsh v. Hutchinson*, 2 B. & P. 226; *Farrar v. Grannard*, 1 New Rep. 80.

she may have assumed that character.¹ In a recent case it was held that a married woman could not be sued upon her contract, although before it was made her husband became bankrupt, and absconded without appearing to his commission, and continues to reside abroad.² Yet where the husband has gone abroad, and has not been heard of for seven years, it shall be *presumed* he is dead, and the wife shall be liable.³

We have before observed that where a feme covert is divorced *à mensâ et thoro*, whether *causâ adulterii* or for any other cause, the relation of marriage still subsists, and the *feme* is not therefore liable on her own contracts even for necessities. This however is not the case after a divorce *à vinculo matrimonii* pronounced by a court of competent jurisdiction; for such a divorce dissolves the nuptial tie *de facto*, and renders the feme responsible for her own engagements in the same manner as though the ceremony of marriage had never taken place; by such a divorce the liability of the husband for the debts of the feme ceases, the feme herself becomes by operation of law a single woman, she is restored to the same rights as if she had always remained single, and her liabilities are in no respect different.⁴

At one time it was held that adultery, in like manner as *causa præcontractus*, was a ground of divorce *à vinculo matrimonii*; but it was afterwards solemnly settled in Fullcombe's case, in 44 Eliz.,⁵ that it was only ground of divorce *à mensâ et thoro*, and this alteration of the law may account for some of the *dicta* to be found in the older cases. The sentence of divorce *à mensâ et thoro* does not, as we have before shown, extinguish the obligations attending the relation of husband and wife, but merely suspends them, and operates only as a temporary separation. The sentence, so far from dissolving the matrimonial tie, by its very tenor contemplates the possibility of reconciliation and renewed cohabitation; and it is in conformity to this notion, that the injured party, before becoming entitled to the benefit of the sentence, is obliged to enter into a bond to lead a chaste and continent

¹ M'Namara v. Fisher, 3 Esp. 18.

² Williamson v. Dawes, 3 M. & Scott, 352; 9 Bingham, 292, S. C.

³ Hopewell v. De Pienné, 2 Camp. 115; Lambert v. Atkins, 2 Camp. 273; 1 Jac. 1, c. 11, s. 2; Reeve v. Hasland, 1 Bl. Rep. 404; Doe v. Jesson, 6 East, 80.

⁴ Anstey v. Manners, Gow, 11.

⁵ Rye v. Fullcombe, Noy, 100.

life, without contracting marriage during the life of the guilty party. The words of the sentence are: "We do declare that the said A. B. ought by law to be divorced and separated from bed, board, and mutual cohabitation with the said C. D., her husband, *until they shall be reconciled to each other*, and we do divorce, &c., bond being given.¹"

From these cases the law now seems clear, that if the husband be a foreigner, who has never been in England,² or if, being an Englishman, he depart from the realm compulsorily, without the power of returning, such absence in either instance renders the wife capable of contracting, and therefore of ability to sue and be sued, and to acquire and dispose of property as if she were sole; and that if the husband be an alien who has once lived here, or a natural born subject within this kingdom, his absence from it under any circumstances, unless he have abjured the realm, or have been exiled from it, or is under a disability to return, will not render his wife capable of contracting, or acting as feme sole, or of suing or being sued as such.

3rdly. *The capacity of a feme covert to bind her separate estate in equity by her own contracts.*

The decisions and principles to which we have referred in the previous part of this article have been confined, as the reader will have noticed, to cases at law, without any regard whatever to the doctrine adopted by Courts of Equity on the subject of the contracts of married women. A great variety of cases have occurred on this subject in Courts of Equity, each varying from the other in nice and superficial distinctions; the complexity and confusion, however, which have hitherto attended these principles have been at length removed, and the question of a feme covert's liability in equity, in regard to her separate estate, is fully, and, as we trust, firmly established.

It was held in Chancery, on an appeal from the vice chancellor's judgment, that where a married woman, having separate estate, and living apart from her husband, employed a solicitor in various transactions, and promised by letters to pay him, but without referring to her separate estate, that her separate estate was liable to the payment of the solicitor's bill of costs,

¹ Poynter, on Marriage & Divorce, 182.

² 3 Campb. 123.

and *semble*, that the separate estate of a feme covert is liable in equity to her general engagements, as well upon an implied undertaking as by a written obligation.¹ A feme covert, having a separate estate, may in a court of equity be sued as a feme sole, and be proceeded against without her husband; for in respect of her separate property she is looked upon as a feme sole,² and in a Court of Equity *baron* and *feme* are considered as two distinct persons, and therefore a wife, by her *prochein amy*, may sue her own husband.³

The liability of the separate estate of a married woman to her general personal engagements was distinctly recognised by Lord Thurlow in *Hulme v. Tenant*⁴ and *Lillia v. Airey*:⁵ and the engagement on the part of Mrs. Barlee, it was said, was equivalent to an express promise to pay her solicitor out of her separate property, for she declared in one of her letters that she did hold herself responsible to the solicitors for payment of their bill of costs, if they did not obtain payment from her husband. That was as much an undertaking to pay out of her separate estate as if she had expressly referred to it, for she had no other means of answering her separate obligations. That it is not necessary *specifically* to charge the separate estate with the payment of a debt in order to make it liable, is shown by the case of *Norton v. Turvill*,⁶ where a feme covert gave a bond; and by *Buelpin v. Clarke*,⁷ where a decree was made for payment of a promissory note given by a married woman out of her separate estate. A bond, or other security, given by a married woman having separate estate, has been sometimes, though not accurately, considered in the nature of an appointment of her separate estate.⁸ The form of the instrument is wholly immaterial; nor is it necessary that there should be any written instrument whatever to bind the separate estate of the wife, if her intention to render it liable be otherwise sufficiently manifested. It was held in a case before Sir William Grant,⁹ where a married woman, having separate property, died, indebted by bond and simple contract, that the creditor by bond had no priority, but that

¹ *Murray v. Barlee*, 3 M. & Keen, 209; see also 4 Simon, 82.

² *Dubois v. Hole*, 2 Vern. 614. ³ 3 Cox, P. Wms. 39. ⁴ 1 Bro. C. C. 16.

⁵ 1 Ves. Jun. 277.

⁶ 2 P. Wms. 144.

⁷ 17 Ves. 365.

⁸ *Greatly v. Noble*, 3 Mad. 79.

⁹ *Anon.* 18 Ves. 258.

all the debts must be paid *pari passu*, the bond, considered merely as a bond, being void; the principle being thus distinctly recognized, that the separate estate of a married woman is liable to her general engagements.

On the part of the appellant, Mrs. Barlee, it was said that the present was the first instance in which it had been held that the *implied* assumpsit of a married woman would charge her separate estate. At law, a married woman can neither sue or be sued, and she is incapable of entering into a contract, even though she be living apart from her husband, and have a separate maintenance secured to her by deed;¹ and even in equity, though her separate estate is recognised, and she may bind such estate by certain acts in the nature of an execution of a power, she is incapable of entering into a contract properly so called; and her bond, her bill of exchange, or other instrument, though operative as a *quasi* appointment, are in reality *qua* bond, bill of exchange, or other instrument, a mere nullity: her person is as sacred in equity as it is in law; and though the rule commonly laid down is, that, *quoad* her separate estate, a married woman is, to all intents and purposes, a *feme sole*, it will be found that for most practical purposes this rule is incapable of application. Thus her separate *status* cannot be so severed from her joint *status* as to enable the Court, where it is of opinion that she has rendered her separate estate liable, to proceed, according to the ordinary course, *in personam*. That difficulty was felt by Lord Thurlow in *Hulme v. Tenant*,² where a joint bond given by a *feme covert* having separate estate and her husband, being an instrument raising only a personal demand, was held to bind estates conveyed to trustees to the separate use of the wife. Lord Eldon never mentioned that decision without disapprobation. In *Nantes v. Corrock*,³ he called it a prodigiously strong case; and in *Jones v. Hains*⁴ he intimated that whenever the point did distinctly occur, it would require full consideration.

The result of the authorities, it was said, was, that although there had been no express determination of the point, whether a wife's separate estate be liable to her general engagements

¹ *Marshall v. Rutter*, 8 T. R. 545.

² 1 Bro. C. C. 16.

³ 9 Ves. 182.

⁴ 9 Ves. 497.

not evidenced by any instrument in writing, yet a very strong opinion upon the point was given by Sir John Leach in *Greatly v. Noble*.¹ In *Stuart v. Lord Kirkwall*,² and *Aguilar v. Aguilar*,³ the question was raised and deliberately considered. To these authorities there is nothing opposed except the anonymous case before Sir William Grant, which, it was said, was too loose a note to be relied on, and the *dicta* of Lord Thurlow in *Hulme v. Tenant*, and *Lillia v. Airey*. What Lord Thurlow said in *Hulme v. Tenant* of the wife's general personal engagements will be found, upon an examination of the contract, to apply not to engagements by mere parol, but to written engagements. For the respondent it was further answered, that the argument used against the non-liability of the wife's separate estate, arose entirely from the confusion of two things, between which, in reality, there was no analogy; namely, the contract in equity of a *feme covert* having separate estate, and an appointment in execution of a power. At law a *feme covert* has a personal incapacity to contract; but in equity she has all the rights and liabilities of a *feme sole* in respect of her separate estate. She may deal with it in whatever manner she pleases, whether by express charge or instruments in the nature of specialties, or by simple contracts. Her separate estate is the creature of a Court of Equity; and the Court, though it cannot reach her person, will follow out all the equities arising from the separate rights with which it invests her, and render her estate, whether personal or real, liable upon that principle of equality which it always observes to the general demands of all her creditors.

From these principles it follows, that it is not necessary that there should be any written obligation to bind the separate estate of the wife. All that is necessary is, that there should be a sufficient obligation *in foro conscientiæ* to raise an assumpsit, for in the administration of her separate estate, all her creditors are entitled to come in *pari passu*.

From the judgment, which is of extreme length, the following extract may be perused with advantage by those who are anxious to acquire accurate knowledge on this subject:—
“It is said that the case of *Mrs. Barlee* raises, for the first time, the question, whether or not a *feme covert* can bind her

¹ 3 Mad. 79.² 3 Mad. 387.³ 5 Mad. 414.

separate estate, and in respect of it be sued as a *feme sole* for law expenses incurred by her, that is, for her attorney's or solicitor's bill of costs upon her retainer, and without any more formal instrument or obligation. For it is not denied, and if it were, all authority would be decisive in removing even a doubt upon this, that had a bond been given to the solicitor, the separate estate would have been liable, and the wife suable upon that instrument, whether the consideration were a bill of costs at law or in equity, or whether the instrument had had its origin in any other consideration."

That at law a *feme covert* cannot in any way be sued even for necessities is certain. But though this is now the settled law, we know that it was not always so; or at least, that an exception was admitted to what all men allowed to be the general rule. When *Corbett v. Poelnitz*¹ was decided, Lord Mansfield held, with the concurrence of all his learned brothers, that where the wife has a separate maintenance, and lives apart from her husband, receiving credit upon the possession of that estate, she ought to be bound, and the action was accordingly held to lie."

But it is certain that that decision never received the assent of Westminster Hall; though those who pronounced it strongly adhered to it. Mr. Justice Buller refers to it emphatically in these words: "All these things have been determined, and I know no reason why these decisions should not be as religiously and as sacredly observed as any judgment in any time by any set of men. I believe they are founded in good sense, and are adapted to the transactions, the understanding, the welfare and interest of mankind."² He adds, "that the reasons on which these decisions were founded were so satisfactory both to the parties interested and to the profession, that no writ of error had ever been brought." It happened, however, that this was a groundless panegyric. The profession was always much divided upon the point, and latterly the general opinion was against it.

A case for the opinion of the Court of Common Pleas was directed by Mr. Justice Buller in *Compton v. Collinson*; though the certificate of the judges, when that case came to

¹ 1 T. R. 5.

² *Compton v. Collinson*, 2 Bro. C.C. 385; 1 H. Black. 334.

be argued,¹ was in conformity with the law as laid down by Lord Mansfield ; yet Lord Loughborough, in delivering the judgment of the Court, observed, after an elaborate review of the cases, that it could not be considered as a settled point, that an action could be maintained against a married woman separated from her husband by consent, and enjoying a separate maintenance. A few years afterwards, that judgment which had been pronounced to be as worthy of religious and sacred observance as any judgment ever delivered, was overruled on the fullest consideration and after two arguments, by the unanimous judgment of all the judges of the day.² The doors of the Courts of Common Law were thus shut against the admission of the equitable principle ; and the law was fixed, that in those Courts the wife could not in any way be sued by reason of her having separate property, and living apart from her husband.

In equity, however, the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is there abundantly acknowledged ; not indeed that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and her trustees. It may be added that the current of decision has generally run in favour of such recognition. The principle was supposed to be carried further in *Hulme v. Tenant*,³ than it had ever been before, because there a bond in which the husband and wife joined, and which, indeed, so far as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's estate vested in trustees to her separate use, though such estate could only be reached by *implication*, and though till then the better opinion seemed to be, that the wife could only bind her separate estate by a *direct* charge upon it. Lord Eldon repeatedly expressed his doubts as to that case ; but it has been constantly acted upon by other judges, and never in decision departed from by himself. It is enough to mention *Heatly v. Thomas*,⁴ and *Bullpin v. Clarke*,⁵ both before Sir. W. Grant, who in the latter case held the wife's separate estate to be charged by a promissory note for money lent to her ; which

¹ 1 H. Black. 834.² *Marshall v. Rutter*, 8 Term Rep. 543.³ 1 Bro. C. C. 10.⁴ 15 Ves. 596.⁵ 17 Ves. 365.

at law never could have charged the husband in any way directly or indirectly. Similar doctrine was held as to a bill of exchange accepted by a *feme covert* in *Stuart v. Lord Kirkwall*,¹ and an agreement by the wife as to her separate estate in *Master v. Fuller*.² In all these cases the foundation of the doctrine appears to be this ;—the wife has a separate estate, subject to her own controul, and exempt from all other interference or authority. If she cannot affect it no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were *discovert*. A wife's power to affect her separate estate being therefore unquestionable, the only doubt that can arise in any case, is whether or not she had validly incumbered it. At first, the Court of Chancery seems to have supposed that nothing could touch the wife's separate estate but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement: afterwards the wife's *intention* was more regarded, and the Court only required to be satisfied that she intended to deal with her separate property.³ When she appeared to have done so, the Court held her to have charged it, and made the trustees answer the demand thus created against it.

A part of the nicety that attends the doctrine of powers thus came to be imported into the consideration of the subject. If the wife did any act directly charging her separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power was always, of course, considered as made in execution of it. And so, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed; thus if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her separate estate. It was held in the cases above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instru-

¹ 3 Madd. 387.

² 1 Ves. Jun. 513; 4 Bro. C. C. 19.

³ 2 Roper on Husband and Wife, ch. 21, s. 3, pp. 243, 244, note; Clancy on Married Women, B. C. ch. 9, pp. 345, 346; 2 Story's Commentary on Equity Jurisprudence, ch. 36, p. 625 to 630.

ments thus made have any validity or operation ; in the same manner as an instrument, which can mean nothing, if it mean not to execute a power, has been held to be made in execution of a power, though no direct reference were made to the power itself.

Doubts however have been in one or two instances expressed as to the effect of any dealing whereby a general engagement only is raised, that is, where the *feme covert* becomes indebted without executing any written instrument at all. That point was discussed in *Greatly v. Noble*,¹ and the late Master of the Rolls appears, in the subsequent case of *Stuart v. Lord Kirkwall*,² to have been of opinion that the wife's separate estate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatly v. Noble*, though he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point.

There is however no reason for drawing any such distinction. If in respect of her separate estate, the wife be in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly her power of affecting her separate estate shall only be exercised by a *written* instrument ? Are we entitled to invent a rule, to add a new chapter to the *Statute of Frauds*, and to require writing where that act requires none ? Is there any equity reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods ? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of paper ? No such distinction can be taken upon any conceivable principle. One of the earlier cases, *Kenge v. Delaval*,³ makes no mention of such a distinction, for there, being indebted generally, is all that is stated as grounding the claim ; and in *Lillia v. Airey*⁴ the party who had furnished necessary supplies to the wife was held entitled to recover to the extent of the wife's separate maintenance. She had, it is true, given a bond, but only for 60*l.* ; the Court

¹ 3 Mad. 79.

² 3 Mad. 387.

³ Vern. 326.

⁴ 1 Ves. Jun. 277.

however held the creditor entitled to a larger sum, the separate maintenance exceeding the amount of the bond.

The case of *Murray v. Barlee* was by no means a case of general charge; if it were, there was no doubt that the claim would lie; but there were written promises. A retainer in writing implies a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney acting under that retainer. So if there be no formal retainer, but only a written acknowledgment or adoption of the professional conduct, or instructions in writing to proceed further, the party who gives such written instructions, in effect promises to pay whatever may lawfully become due to one acting in obedience to them, that is to pay the costs which should be taxed.

Nothing could more effectually defeat the very purpose of such settlements than denying power to the wife thus to charge her estate. She is meant to be protected by the separate provisions from all oppression and circumvention, and to be made independent of her husband as well as of all others. If she cannot obtain professional aid, and that with the same facility which other parties find in obtaining it, she is not on equal terms with them. If the husband or the trustee can hold her at arm's length and refuse her the proceeds of the fund held by them for her use, and if they can by a verbal retainer engage a solicitor, while she can only obtain such help by executing a mortgage or by granting bonds or notes which are in themselves absolutely void, she is not on the same footing with them.¹ The Court therefore held that so

¹ This is in strict analogy to the practice recognized in the Ecclesiastical Courts, where every consideration is paid towards enabling the female to obtain, with facility, legal aid and assistance in matters of controversy between husband and wife, in order that the latter may be on equal terms with the former in approaching our Courts of justice;—and therefore, in general, in those Courts the husband is compellable to defray the wife's costs; otherwise the wife would be oftentimes disarmed and denied justice. *D'Aguilar v. D'Aguilar*, 1 Hagg. 787; *Bray v. Bray*, 1 Hagg. 168. The husband has by the law of this country all the wife's property, except when settled on the wife, and therefore the wife must have the means of self defence (*pendente lite*) and subsistence from him—but when she has a separate fortune, the Court always considers whether such separate means be sufficient for self defence. If it deems them sufficient she is not entitled to alimony in those Courts, or costs during suit: and if the wife be not entitled to costs from her husband because she has ample means of her own self defence, it follows, that it would be most unjust to deny her the right in the simplest manner of charging her separate estate with such costs.—The principle upon which the costs

far from a solicitor's or attorney's bill being less entitled to favour in Courts of Equity when sued upon, as against the separate estate of a married woman, the argument was all the other way—and affirmed the decree with costs.

From the foregoing observations, it is evident that the cases respecting the separate liability of a married woman may be classed under the following general heads.

1st. Where she is merely living separate. 2ndly. Where she is living separate by consent and with a separate maintenance. 3rdly. Where she is living separate, her husband being abroad. 4thly. Where she is living separate, her husband being a foreigner, and resident abroad, or never having been in this country. 5thly. Where she is living separate, her husband being banished or transported. 6thly. Where she is living separate in adultery. 7thly. Where she has been divorced. 8thly. Her liability in equity in respect of her separate estate.

1st. Where the wife is merely living separate with or without the consent of her husband, it is clear that she cannot make herself liable to be sued as a *feme sole*; a position recognized in all the cases.

2ndly. Where the wife lives separate by consent and even enjoys a separate allowance, it is now settled that she cannot render herself personally liable.

3rdly. Where the wife is living separate from her husband, and he is an Englishman resident abroad, she cannot render herself liable by her own contracts, although the residence abroad of her husband be permanent; nor can she in such case maintain an action as a *feme sole*.¹

4thly. Where the wife is living separate from her husband, and he is a foreigner, residing abroad, the former decisions held that the wife was liable, but the more recent cases establish her non-liability; except where the husband, being an alien, has never been in this country, or is under a permanent disability to return to this country.

5thly. Where a married woman is living separate from her of the wife are taxable *de die in diem* against the husband is thus pithily stated by Sanchez:—"Quando uxor litem divortii adversus virum intentaret, dubium non est, quin ei alimenta et litis expensæ à viro ministranda sint, ne expensis destituta à causâ cadat.—Sanchez, lib. 10, Disp. 8, s. 28. Vide also Oughton, tit. 206, 207.

¹ Broggett v. Fier, 11 East, 301.

husband, who has been banished or transported, she is liable to be sued as a *feme sole*, until the *actual* return of her husband.

6thly. Where the wife lives separate from her husband and in adultery, she cannot be sued as a *feme sole*.

7thly. Where a woman has been divorced *à mensâ et thoro*, as the relation of marriage subsists she is not liable to be sued as a *feme sole*, but it is otherwise where she is divorced *à vinculo matrimonii*.

8thly. In respect to her separate estate, a *feme covert* in equity is liable on her own contracts as though she were a *feme sole*, in regard to her separate estate; her person, however, is exempt even in equity from any liability arising from her engagements.

R. C.

ART. IV.—NOTICE OF DISHONOUR.

THE numerous decisions which since the case of *Solarte v. Palmer* have been given on this subject, and the nicety of distinction taken between them respecting the sufficiency of a notice in point of form, render it extremely difficult to determine, without a thorough review of the cases, what particular words or expressions will convey the precise amount of information which the law requires to be given to the drawer or indorser of a bill, or the indorser of a promissory note.

Our readers need hardly be reminded that there is no obligation by the law merchant to give a *written* notice of dishonour, even in the case of a foreign bill. A verbal notice to the party will in all cases suffice; and were it not for the greater facility of proof which belongs to a writing, it would be preferable to give such notice by parol, because the person giving it would scarcely fail to communicate all the information necessary. Moreover, a verbal communication may be called in aid of a written notice where the latter is defective, the technical rule of evidence having no application to such a case as this.

A notice of dishonour is required by law to be given to every person who is chargeable with the payment of a bill or note, but chargeable in a secondary degree only. Its purpose and object have reference originally to bills of exchange, the

acceptor of which has or is supposed to have in his hands monies belonging to the drawer applicable to the payment of the bill; and therefore if he fails so to appropriate the money, the drawer is to be informed of it, so that he might at once withdraw the funds from his hands. But the rule obtains where the reason has no application. Thus every indorser, as well of a promissory note as of a bill of exchange, is entitled to notice of dishonour; and it seems at least doubtful whether a party who has guaranteed on behalf of the acceptor the due payment of a bill, would not be discharged by the want of a due notice of dishonour.¹ On the other hand, a party who is really the principal or one primarily liable, though on the face of the instrument he appears to be a secondary party, as the drawer of an accommodation bill, is not entitled to and cannot complain of the want of notice, where he has not in any way provided for its payment by the acceptor, and has not therefore sustained any damage.²

The contract of such secondary party, (and every party to a bill or note other than the acceptor and maker stands in this position,) is to pay the bill or note on request, in case the principal makes default. Hence every notice of dishonour, whether given to the drawer or to an indorser, must convey the information, first, that *the* bill or note was presented when due; secondly, that it was dishonoured; and thirdly, that the party addressed is to be held liable for the payment of it.³ So that this information be given, it matters not what may be the form of, or in what language the notice may be couched; and as the cases will shew, it is sufficient if it contain any words or form of expression which in mercantile phraseology would be so understood, though neither the word "presented" nor "dishonoured" be used.

In the first place, the notice should so describe the instrument as that the party addressed should not be misled. Where a notice, directed to an *indorser*, described the bill as one *drawn* by him, Abbott C. J. held it insufficient on this ground.⁴ It is in general advisable to mention the date, the

¹ See *Phillips v. Astling*, 2 Taunt. 206.

² See *Fitzgerald v. Williams*, 6 B. N. C. 68.

³ *Parke B.*, in *Lewis v. Gompertz*, 6 M. & W. 399.

⁴ *Beaughamp v. Cash, Dowl. & Ry.*, N. P. C. 3.

amount, the time of payment, and the parties, as they are designated on the face of the instrument, though, as will appear from the cases, all these particulars are not always necessary.

The next consideration is by far the more important, as being that in respect of which a person framing a notice of dishonour is more apt to err. We will go briefly through the cases on this point; for although the principles laid down in some of them as to the construction of such an instrument, particularly in that of *Solarte v. Palmer*, confessedly go too far, we shall find scarcely one, the *decision* on which is not strictly correct.

In *Hartley v. Case*,¹ which may be considered the first in order on the subject, the notice was in these words: "I am desired to apply to you for the payment of the sum of 150*l.* due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." This, it appeared in evidence, was given on the day when the bill became due; but the Court held it insufficient, as containing nothing more than a demand of payment. "There is no precise form of words," said Abbott C. J. "necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." It was objected also, and with some reason, that the bill was not sufficiently identified as a bill drawn on, or a bill accepted by the defendant, and the Court observed, at the close of its judgment, that it did not appear by the notice whether or not it had ever been accepted at all.

The case of *Solarte v. Palmer*,² which, from the Exchequer Chamber, was carried by appeal to the House of Lords, and which therefore has become a paramount authority, was similar to and proceeded on the authority of *Hartley v. Case*, so far as regards the point in question. In other respects the notice was free from objection. It ran in these terms—

"Gentlemen,—A bill for 683*l.*, drawn by Mr. Josiah Keats upon Messrs. Daniel Jones & Co., and bearing four indorse-

¹ 4 B. & C. 339.

² 7 Bing. 529; S. C. 1 B. N. C. 194.

ment, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to, Gentlemen, your obedient servant,
J. & S. PEARCE."

Here also it was proved that the bill became due before the notice was given. The grounds of the judgment in the Exchequer Chamber,¹ which were confirmed in the House of Lords, are thus expressed by Tindal C. J., "The notice of dishonour, which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover, most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms or *by necessary implication*, that the bill has been dishonoured, and that the holder looks to him for payment of the amount. It is perfectly consistent with this notice, that the bill has never been presented at all, and that the plaintiff means to rely upon some legal excuse for the non-presentment. The present case is stronger against the sufficiency of the notice than that of *Hartley v. Case*, where there was at least an allegation that the bill had *become due*, which is not found here. This letter may not improbably have been written with a different intent than that of giving notice of the dishonour to the indorser, and may have been information that an action was about to be brought by the attorney, taking for granted that the notice of the bill's dishonour had been given in the ordinary way, before the bill had been put into his hands for the purpose of suing thereon. At all events, however intended, it appears to us not to amount to such notice."

The phrase above put in italics, which was repeated by the House of Lords, did not long pass without disapprobation.

"I am not prepared to say," observed Parke B., in a subsequent case (*Hedger v. Steavenson*²), "that I am bound by all the reasoning or language of the learned judges, in giving their opinion, and therefore should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, 'by express terms or necessary implication,' that the bill was presented and dishonoured. It seems to me

¹ 7 Bing. 529.

² 2 M. & W. 799.

enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him. However, supposing that we are bound by the precise expression of Tindal C. J., in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the term 'necessary implication,' for were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor. We must not put such a meaning on that expression as to say that the language of the instrument must be so precise as to exclude the possibility of any other inference than that the bill had been so presented and returned unpaid. On the subject of the term 'necessary implication,' Lord Eldon says, 'necessary implication means not natural necessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed.'"¹

Similar opinions have been expressed by others of the judges, in reference to the cases before them and acted upon, and consequently, though the case of *Solarte v. Palmer* remains, and will remain, a standing authority, tested even by the rule of construction thus qualified, a notice is not required to go further than intimate in such a way as that a man accustomed to business cannot reasonably remain ignorant of the fact, that the bill or note has been duly presented and dishonoured. Accordingly, in the case which called forth the foregoing remarks of the learned baron,² a notice in the following form was holden good: "Sir,—I am desired by Mr. Hedger to give *you notice* that a promissory note for 99*l.* 18*s.*, payable to your order, two months after the date thereof, became due yesterday and has been *returned* unpaid, and I have to request that you will please to remit the amount thereof, with 1*s.* 6*d.* *noting*, free of postage, by return of post." "Could any doubt be entertained," continued the learned judge, "by any mercantile man who received this notice, that the note had been presented to the maker when due and was not honoured? It states the time when the note became due, and that it had been returned unpaid. Can any one doubt the use of the term 'returned unpaid?' The word 'returned' is almost a technical term in

¹ *Wilkinson v. Adam*, 1 Ves. & Bea. 466.

² *Hedger v. Steavenson*, 2 M. & W. 799.

matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid. Upon reading this notice, I should say that it appears from it, by necessary implication (in the meaning I attach to the term), that the note has been duly presented and dishonoured."

It must not however be taken that the word "returned" would, if standing alone, be considered sufficient; for notwithstanding that the Court of Exchequer in the case just referred to, seemed disposed to reject the reference to notarial charges, as unnecessary to the case, that has in a subsequent case been looked on as an ingredient of value. In *Houlditch v. Cauty*,¹ the notice was as follows: "Messrs. Houlditch are surprised that Mr. Cauty has not taken up Chaplain's bill according to his promise; *are also surprised to hear that Mrs. Gib's bill was returned to the holder unpaid.*" The latter was the bill in question; and it appeared that on the day on which the note was received, the defendant called on the plaintiff, and expressed his regret that such bill had been dishonoured, and promised payment. Upon these facts the decision rested, but the inclination of the Court was against the sufficiency of the written notice, notwithstanding the decision in *Hedger v. Steavenson*. In the latter case the Court of Exchequer questioned the propriety of *Boulton v. Welch*,² which however the Court of Common Pleas still seem inclined to uphold; and there is little doubt that in that Court at least a notice similar to the one in *Boulton v. Welch* would be deemed invalid. It was in the following form: "Sir—The promissory note for 200*l.*, drawn by Henry Hanley, dated the 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is *returned* to me unpaid. I therefore give you notice thereof, and request you will let me have the amount thereof forthwith." The phrase "returned with charges," or the word "returned," coupled with any reference to noting or expenses, would clearly be held sufficient in all the Courts.³

The word "dishonoured" has a more comprehensive signification than the word "returned," and would no doubt be taken to express, with sufficient clearness, the fact of present-

¹ 4 B. N. C. 411.

² 3 B. N. C. 688.

³ *Grugeron v. Smith*, 6 Ad. & El. 499. See *Strange v. Price*, 2 P. & D. 278.

ment in due time and manner, as well as the default of payment.¹ Indeed it does not appear that the sufficiency of this word has been called in question.

Having observed upon the effect of a charge for "noting" or "notarial charges," it is necessary to observe also, that that word has a peculiar and well understood meaning, for which it is very doubtful if any equivalent can be found. In a recent case,² a notice in the following language was holden bad: "This is to inform you, that the bill I took of you, 15*l.* 2*s.* 6*d.* is not took up, and 4*s.* 6*d.* expense; and the money I must pay immediately." The instrument referred to, instead of a bill was a promissory note, indorsed to the defendant, and by him to the plaintiff. Upon this discrepancy however no reliance was placed. But it was strongly contended that the expression "not took up, and 4*s.* 6*d.* expense," conveyed as clear an intimation of dishonour as the words "returned with notarial charges;" and we must be permitted to say, that the doctrine laid down in *Solarte v. Palmer* seems in this case to have been carried to its full extent. The language of the Court, in delivering judgment after time taken to consider, is important: "We entirely agree," said Tindal, C. J., "that the rule laid down by the House of Lords is not to be extended, and that any case to be governed by it should fall clearly within its principle. But at the same time nothing can be more inconvenient than on each particular occasion to be under the necessity of recurring to nice and subtle distinctions by way of exception from its authority. And we cannot hold the present case to be brought out of the reach of that decision by any sufficient and clear distinction." Then referring to *Grugeon v. Smith and Hedges v. Steavenson*, the learned judge continued, "We are far from saying that these cases may not have been properly decided; for it is difficult to give any other meaning to the terms "returned" and "returned with charges," than an intimation that the bill had been actually presented, refused payment, and returned to the holder on that account. But such is not the necessary construction of the present letter. That the note (misdescribed as a bill) has not been taken up, points rather more at an ex-

¹ See *Woodthorpe v. Lawes*, 2 M. & W. 109.

² *Messenger v. Southey*, 1 Sc. N. C. 180.

pectation that the party addressed, or some other prior party to the note, had engaged to take it up, than as a regular presentment at the maker's, and a refusal. And the expression '4s. 6d. expense' falls very short of that of 'returned with charges.' On the whole we think it safer to hold ourselves bound by the decision in *Solarte v. Palmer*, followed by that of *Boulton v. Welch* and *Strange v. Price*." The case lastly referred to by the learned chief justice contained nothing about expenses. There the notice was in this form: "Messrs. Strange and Co. inform Mr. James Price that Mr. John Betterton's acceptance, 87l. 5s. is not paid. As indorsee, Mr. Price is called upon to pay the money, which will be expected immediately;" and the Court, without hesitation, pronounced it defective.¹

The following form of notice falls within the same principle: "Sir—A bill for 30l., dated 18th August, 1837, at three months, drawn and indorsed by R. Everett upon and accepted by William Tuck, and indorsed by you, lies at my office *due and unpaid*."²

The third position above mentioned, viz. that the party addressed is intended to be held liable for payment of the bill, is very likely to lead to misapprehension. Its origin is referable to the observations of Buller, J. in *Tindal v. Brown*,³ a case in which the only notice of dishonour was a request by the maker of the note in question to the defendant, who was the first indorser, that the latter would take it up for him. "The purpose of giving notice," said the learned judge, "is not merely that the indorser should know that the note is not paid, for he is chargeable only in a secondary degree, but to render him liable you must show that the holder looked to him for payment, and gave him notice that he did so. A case might easily be put, where the indorser might have notice from the holder, and yet would not be liable; as if in the present case the holder had written a letter to the indorser, containing the circumstances which have been given in evidence, the indorser would have been discharged, because it would have amounted only to this: 'the note made by Donaldson, and indorsed by you, is not paid, and I have given

¹ *Strange v. Price*, 10 Ad. & El. 125.

² *Phillips v. Gould*, 8 C. & P. 355.

³ 1 T. R. 167.

him credit till to-morrow.' Though there is no prescribed form of this kind of notice, yet it must import that the holder looks on the indorser as liable, and expects payment from him, that he may have his remedy over by an early application." It rather regards the circumstances under which the notice was given, than the form of the notice itself; and its proper practical meaning is, that it is not enough to show that the indorser knew that default had been made. But the bare fact of a notice of dishonour coming from a party having a right to enforce payment of the bill—coming, as it were, adversely—imports of itself that the latter is intended to be held liable for its payment; and nothing need be said in it concerning such intention, nor need it contain any request of payment.¹ It follows therefore that a notice by a stranger, a party having no right to the proceeds, is of no avail,² that is, if given in his own name; but any party to the instrument is competent to give such notice to a prior party, though he be not the actual holder at the time.³

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ART. V.—FRENCH LAWS ON DUELLING.

1. *Projet de Loi sur le Duel, avec l'Exposé des Motifs.* Par M. Le Garde des Sceaux, Ministre de Justice. 1829.
2. *Rapport, fait à la Chambre des Pairs.* Par M. le Baron Pasquier, au Nom d'une Commission chargée de l'examen du Projet de Loi sur le Duel. 1829.
3. *Essai sur le Duel.* Par le Comte de Chatauvillard. Paris. 1836.
4. *Du Duel, sous le Rapport de la Legislation et des Mœurs, &c.* Par Auguste Nougarede de Fayet, Avocat, &c. Paris. 1838.

THE French laws on duelling, after trying almost every shade of toleration and severity, have been reduced by a curious concurrence of circumstances to much the same condition as our own; and a cursory review of them may help to throw light

¹ See *Cooke v. French*, 10 Ad. & El. 131, n.; *Lewis v. Gompertz*, 6 M. & W. 399.

² *Stevens v. Kennett*, 2 Camp. 177.

³ *Chapman v. Keane*, 3 Ad. & El. 193.

on a question which has hitherto proved a perpetual source of embarrassment to legislators,—whether it is both possible and expedient to suppress a practice, so thoroughly ingrained into the habits and interwoven with the modes of thinking of the higher classes in all the politest, most intellectual, and best educated communities.

The history of the French laws on this subject is succinctly and lucidly given by the minister of justice in the document named first at the head of this article. He is not more successful than his predecessors in the same path in tracing the precise origin of the custom, but it is quite enough for our purpose to know that it grew up in close connection with chivalry; and that during the greater part of the middle ages the single combat was sanctioned as one of the legal admitted modes of determining disputes. The minister of justice also sees in it a relic of the private wars which the feudal chiefs were wont to wage with one another; and considered in this point of view, it might deserve encouragement, instead of reprobation, at a period when the wisest sovereigns found themselves unable to suppress the turbulent passions of their nobility.

Towards the end of the sixteenth century we find duels prohibited in France, unless under the express sanction of the king, and confined in all cases to gentlemen. Thus we find Henry the Second authorising the duel which ended in the death of La Chataigneraye; an event which caused the king to renounce his privilege, and declare that henceforward he would permit nothing of the sort. It would seem that the royal licence had hitherto operated as a safety-valve; for no sooner was it withdrawn, than the passion for duelling burst forth with unprecedented violence. Within a short space of time, as Saulx-Tarannes tells us in his memoirs, six thousand men of quality perished in single combat. The prohibition was regarded as a direct encroachment on the privileges of the nobles, and it became a point of honour to set it at defiance. No doubt also the practice was much encouraged by the example of Francis, whose peculiar pride it was to be regarded simply as the first gentleman in his realm. His challenge to Charles the Fifth was more than sufficient to outweigh the influence of half a century of legislation.

In 1563 the Council of Trent turned aside from the more immediate objects of the assembly to denounce "a detestable usage introduced by the cunning of the devil to compass the destruction of the soul through the bloody death of the body;" and the ordinance of Malins, framed by Charles the Ninth on the requisition of the States of Orleans, made duelling a capital crime. But equally vain were the canon and the ordinance, the suspended sword of justice and the threatened thunders of the church. The evil increased instead of abating, and during the disorders of the league it would have been well if the strict rules of single combat could have been enforced; for every advantage of numbers and weapons was unceremoniously taken, and the shortest and safest mode of disposing of an adversary was deemed the best. Henry the Fourth speedily suppressed this barbarous system of private war, and published an edict against duelling in general, but its results may be estimated from the fact, that seven or eight thousand persons belonging to the higher class perished in single combat between 1589 and 1608. The truth is, the chivalrous character of this monarch rendered him exceedingly unfit to enforce a prohibition of the sort, and we find that the number of letters of grace issued within the same period correspond very nearly with the number of the slain. In 1609 he tried another mode, or rather reverted to that which was in use prior to the death of Chataigneraie. He passed an edict reserving to himself the right of authorising an encounter in cases where the injury did not admit of reparation, and took a solemn oath to grant no further letters of grace to duellists.

According to this edict, the injured party might complain in the first instance to the marshals of France, or, in the provinces, to the governors or lieutenant-generals, and if they were unable to award satisfaction, the case was to be reported to the king. The ninth article provides that "Whoever shall demand the combat, and shall be decreed to have taken offence lightly and without ground, shall be dismissed with disgrace:" the tenth, "that the aggressor who shall have offered another an insult judged and recognized as affecting honour, shall be deprived, during six years, of all charges, honours, grades, offices, dignities, pensions, &c., and not presume to come within ten leagues

of the court." The bearer of a challenge or offensive message was to be degraded for life, undergo perpetual imprisonment or an infamous death according to the pleasure of the crown, and forfeit the half of his property. If an unlicensed meeting took place and one of the parties were killed, the survivor and seconds were punishable by death, degradation, and forfeiture. This edict was much too severe to be effective, but that part of it which related to the establishment of the marshals as a court of honour was afterwards improved upon and extended with success.

In 1611 an edict was passed, from which it appears that it had become the practice to evade the law by contriving apparently accidental meetings, at which, under the pretence of sudden irritation, the quarrel was fought out.

In 1613 the prohibitions were repeated, accompanied by a solemn declaration on the part of the sovereign, that no consideration should induce him to issue a pardon. Two fresh declarations to the same effect appeared in 1614, one in 1617, one in 1623, three in 1624, one in 1625, and one in 1626. The last contains some remarkable passages. It denounces the heaviest penalties against those who engage or suffer others to take part in the actual combat, "which can never be done, except with the cowardly object of seeking in the address or courage of a third party, the safety of their own persons, which they are willing to expose through vanity, contrary to their duty, in this sole confidence." The fullest assurances are given that no man's reputation shall suffer by obedience: "And insomuch as many, on being challenged, may fight not through rage alone and brutal passion, as sometimes occurs, but from a fear of being suspected of wanting courage if they refused to go out; to relieve this vain apprehension, and, moreover, reward the merit and wisdom of those who, led by reason, the love and the fear of God, or by a pious desire to obey our laws, shall refuse challenges, and reserve their courage for legitimate occasions requiring it for the good of our service and the advantage of our state: We declare, that we hold, and always shall hold, such refusals for marks and proofs of a well-conducted valour, worthy of being employed by us in military trusts, and the most honourable and important, as

we promise and vow before God to bestow such on them most willingly when the occasion shall arrive."

The great officers of the crown, governors, lieutenant-generals, &c. within whose jurisdiction or vicinity quarrels shall break out, are enjoined to summon the parties before them, and, with the advice of two or three neighbouring gentlemen, to award a fitting satisfaction.

In 1627 a dispute took place at Versailles between the Duc d'Hallain and the Sieur de Cressias. The Sieur de Liancourt was reported to have carried a message in the royal chamber, and both seconds and principals were consequently forbidden the court, but within a very short time an explanation was offered, and the king published a declaration to announce that the circumstances did not require him to deprive the offenders any longer of "the advantage of his countenance." They were recalled accordingly, and the incident may be taken as a fair specimen of the inefficacy of the laws to restrain the practice, and the indulgence with which transgressions of the kind were regarded by the crown.

The parliament of Paris was not so lenient. In 1627, Francis de Montmorency, Sieur de Bouteville, the Count des Chappelles, and others, being adjudged guilty of divers infringements of the laws against duelling, were condemned to have their heads cut off on a scaffold at the Place de Grève, if they could be apprehended, if not, by effigy, in a representation (tableau) attached to a gallows.

It is obvious, from a remarkable edict issued in 1643, that about this period the rage for duelling was still unchecked. The commencement of this curious document runs thus :

"Louis, by the grace of God king of France and Navarre, to all present and to come, greeting : If we considered simply as king the blood of our nobles shed by the madness of duels, we could not witness the tragic effects of a passion so brutal and so prejudicial to France ; but as the quality of Very Christian King obliges us to be infinitely more sensible to the interests of God than to our own, we cannot think without horror of this detestable crime, which, violating at the same time the respect due to us by our subjects as their sovereign, and the obedience which they owe to God as their Creator and Judge, pushes them by a monstrous madness to sacrifice their bodies and souls to this idol of vanity, which they adore

to the contempt of their salvation, and which is no other than the demon, who, presenting himself to them under the veil of a false honour, dazzles them to such an extent that they prefer precipitating themselves into an eternal misery to suffering a purely imaginary shame. Their fury goes to this excess that, to engage in these abominable duels, there is no need of being outraged, nor even of having received the slightest offence; it is enough to be summoned to them by those whom they never saw, and often against persons to whom they are more attached. This fatal moment couples so closely by a sacrilegious tie those even who are not united by affection, that they expose not only their lives, but their friends', one for the other; and sometimes severs in so cruel a manner those who are mutually attached, that, surpassing in fury the most cruel enemies, they tear from one another by a double death both the life of the body and the life of the soul.

"But what shows still more clearly that it is the artifice of this immortal and capital enemy of man which spreads so deplorable a blindness over the spirit of our nobility, is, that generally all men of gentle birth would hold themselves dishonoured, if they refused to renounce, by actions worse than barbarous, all the hopes of Christianity; and many of them do not believe themselves wanting to their honour when they fail to be present in our armies to maintain, by the justice of our arms against our enemies, the reputation of our crown, and share in the only true glory which is acquired by serving king and country in a lawful war. The demon then must have charmed them, to make them fix the highest point of valour in combats of gladiators, which were formerly only practised by the most miserable of all the slaves, and which we still see often practised by those who are in the lowest of all servile conditions; whereas it is by enduring with invincible constancy the labours and perils of war that the grandeur and firmness of a man's courage are displayed. It is these generous sages that we repute truly valiant, and truly worthy of our favour, not those madmen, who, like unhappy victims, staining the earth with criminal blood, descend into the abyss loaded with the maledictions of God and the anathemas of the whole church."

After reciting the preceding edicts, it goes on:

"But the violence of so inveterate an evil becoming more inveterate in proportion to the remedies, it has been found impossible to arrest it either by examples of justice or the effects of clemency. Experience nevertheless has shown that, for the purposes of repression, severity is much fitter than indulgence, such as was shown by the late king our most honoured lord and father, when, in the

extreme joy which it pleased God to give him on our entrance into the world, and in acknowledgment of the services rendered by the greater part of the nobility in his armies with so much zeal and fidelity, he relaxed so far as to grant free pardons to some of those who had contravened his edicts, hoping by this grace to render them in future more strict in their duties. But, on the contrary, as if this facility of pardon for the past had given them the hope of an entire impunity for the future, they were hurried away and continued to be hurried away with so much violence into those impious combats, that never was so great a number of duels fought in the same space of time. It seems as if they took a pleasure in trampling our sovereign authority under foot more audaciously than ever, and as if they sought to triumph over the goodness of their kings by an impious contempt of it."

The French legislators, in common with most others, had yet to learn that the most inefficient system it were well possible to frame, is one compounded of capricious indulgence and revolting severity. This edict, after making sundry provisions for the satisfaction of affronts, denounces all duellists as guilty of *lèse-majesté*, divine and human, condemns them to death, and forbids them to be buried in consecrated ground. The very lacquey who carried a challenge was declared guilty of a capital offence. As a fresh declaration was promulgated the year following, it may be assumed that this edict was as ineffective as the rest.

In 1651 a number of gentlemen, including members of the most distinguished houses, signed a declaration solemnly pledging themselves to refuse all sorts of challenges, never to fight a duel on any ground whatever, and seize every occasion for declaring their abhorrence of the practice. The marshals of France sanctioned it by their formal approval, and the prelates in full conclave held up the subscribers as setting a laudable example to all Christian communities.

In the same year a new edict appeared, relaxing little of the severity of the former, but prescribing accurate and often judicious regulations for the reparation of affronts. Thus the marshals, governors, &c., are authorized and required to appoint one or more persons of quality in each district to receive information regarding disputes, and forward it in due course, so that the offending party may be compelled to make the fitting submission or apology.

The resolutions published by the marshals of France in 1653, with a view to the enforcement of this edict, appear well adapted to their end. We commend the second to the attention of Mr. O'Connell :

"That many gentlemen having already protested solemnly and in writing to refuse all sorts of challenges, and never to fight a duel for any cause whatever, it is so much the more incumbent on them to afford explanation ; that otherwise they would formally contravene their own declaration, and would consequently be more worthy of reprehension and chastisement in the arrangement of disputes occurring for want of explanation."

The edict of 1651 is regarded as the basis of the celebrated edict of 1679, which, by universal testimony, was attended with success. Addison gives it the high praise of having banished the false point of honour from the spirit of a nation so sensitive and impetuous as the French ; and contemporary writers are agreed as to the fact, that duels became comparatively rare from the period of its enactment till the death of Louis the Fourteenth.

But on looking closely into the character of its provisions, we find nothing materially distinguishing it from the preceding edicts. The marshals, governors, &c., are charged anew to constitute courts of honour in each district, and compel obedience to their decisions ; and then, after appealing to the articles regarding the reparation of affronts in proof of the care taken of the honour of the nobility, his majesty proceeds to denounce death or degradation against all who contravene his injunctions. In case of an actual encounter, both parties are declared guilty of a capital offence. If death ensues, the memory of the deceased is to be proceeded against for *lèse-majesté*, divine and human.

Persons of inferior rank who shall presume to challenge gentlemen or engage other gentlemen to fight for them, are to be hanged. Servants carrying challenges, or attending their masters to the field, are to be whipped and branded for the first offence, and sent to the galleys for life for the second. Lookers-on, coming for the express purpose, are to incur heavy forfeitures.

We can only account for the alleged efficacy of this edict by supposing that the result is attributable almost exclusively

to the manner in which its provisions were enforced. The marshals and their substitutes were probably more active in reconciling differences, and the king must have been somewhat more scrupulous than his predecessors in keeping the vow contained in one of the concluding articles, never to grant a pardon on any pretence whatever. In the *Projet de Loi* it is expressly said, on the authority of Barnave, that the law was suffered to take its course; but this is hardly credible, when we consider the unjustifiable severity of the penal enactments.

The Count de Chatauvillard thus alludes to the ordinances of Louis the Fourteenth:

"In fact, the noble heart of the king could not be brought into accordance with his ordinances; he would have despised, and, perhaps, have driven from his court, the coward marked with the brand of infamy; he would have said to the courtier, as the Marshal de — (one of the judges of the point of honour, and one of the stern subscribers of the regulations against duelling) said to M. —, who had received a blow without revenging it: 'Allez vous laver, Monsieur.' And this gentleman remained under a cloud until he had found an opportunity of getting himself killed, which he did too late for his honour.

"Finally, these terrible punishments, these deplorable edicts, these degrading reprisals, proved less powerful than the infamy of a refusal to fight, and rendered these laws useless and cruel at the same time: the spirit of the age so willed it.

"A philosophic pleasantry of Molière gave them a fresh blow; they fell into desuetude, and duels became less frequent on that account.

"In *The Sicilian*, sc. 13, a character enters and says to him, 'I have received a slap in the face; you know the meaning of a slap in the face given with the open hand in the middle of the cheek. This slap in the face weighs heavy on my heart, and I am uncertain whether, to avenge the affront, I ought to fight my man, or cause him to be assassinated.' 'Assassinate, it is the shorter and safer method,' replies the Sicilian; 'who is your enemy?'"

During the minority of Louis XV. duels multiplied anew: the general dissoluteness of manners, encouraged by the regent, made it impossible to prevent the passions of the young nobility from breaking out in this direction. Daguesseau struggled hard to make the laws respected, but the numerous

channels of corruption through which favour was dispensed, and court influence exercised, neutralised his best efforts.

A new edict, backed by a royal declaration, was promulgated in 1723, and this closes the list. No fresh laws of any sort were passed against duelling whilst the monarchy lasted; and the existing laws were only enforced in extreme cases—when an unfair advantage had been taken, or the encounter had been wantonly provoked.

At the meeting of the States-General in 1789, the nobles were silent on the subject. A large proportion of the clergy demanded a renewal of the ordinances, and their careful enforcement. The third estate was divided on the question: fifty-six bailiwicks called for severer laws, and exclaimed against the barbarous indulgence with which this crime was tolerated: ninety-eight, on the contrary, demanded the repeal of the laws against duels: "they hoped, from the progress of intelligence and an education truly national, that the people would come of themselves to regard the act of killing a fellow creature as a real crime and not as a token of honour."

The records of the Constituent Assembly are filled with addresses requiring a new system of legislation regarding duels; but the penal code of 1791 contains no provision concerning them, and all preceding laws of a penal character are repealed. The omission was certainly not attributable either to forgetfulness or neglect, but the penal code of 1810 resembles that of 1791 in this particular. No mention is made of duels, and the silence of the framers has proved not a little embarrassing to the courts.

The article 309, declares every voluntary act of homicide to be murder. Art. 309, assigns a punishment for wounding: art. 311, for striking a blow: and art. 319, for homicide, even when involuntary, when caused by culpable inattention, want of skill, or breach of regulation.

There are exceptions; but the 63rd article provides that no grounds of excuse shall be admitted, except such as are specially mentioned in the code.

Several of the Courts Royal (Courts of Appeal ranking next to the Court of Cassation) held, that, as killing in single combat was to all intents and purposes a voluntary act of

homicide, and duels were not mentioned amongst the legal grounds of excuse, the duellist who killed his adversary was guilty of murder. On the same principle, a blow struck, or a wound inflicted, brought the party within the scope of a penal enactment.

But the better opinion was, that, if the duel was fairly conducted, neither party was criminally responsible; and in 1828 the Court of Cassation pronounced a formal judgment, confirmatory of several others, to this effect.

This led to the *Projet de Loi*, named at the head of this article. In its original form it provided, that, in every case of death or wounding in a duel, the parties engaged should be interrogated and arrested: that the *proces verbal* should be transmitted to the Chamber of Accusation, which was to exercise its discretion as to the supposed grounds of excuse, but on due proof of the bare matter of fact of killing or wounding, it was to send the matter to be tried at the assizes. The jury were to be asked whether grounds of excuse existed, and a challenge, or provocation, for a serious affront or injury, was to be regarded as such ground. If the jury replied in the affirmative, the act of killing was placed upon the footing of an excusable homicide, except that the temporary deprivation of civil rights was to be added to the punishment assigned to that peculiar class of offences in the code.

The most important modification proposed by Baron Pasquier, in the name of the committee of the Chamber of Peers to which this Project was referred, regarded the powers of the Chamber of Accusation. The committee thought that this preliminary tribunal, which bears some faint analogy to our grand jury, might safely be permitted to take the extenuating circumstances into consideration, and declare generally, as in other cases, whether the charge was of a nature to be tried. Why, it was fairly urged, should it be apprehended that they would be too indulgent? On the contrary, there was every reason to suppose that they would endeavour to lessen their own responsibility as much as possible, and send all doubtful cases before a jury, which might often be the means of giving them an unnecessary and injurious notoriety.

The framers of the law argued that publicity would operate

as a check ; the committee, that it was more likely to operate as an encouragement : and we incline to think that the committee formed the truer estimate of the national character.

The committee, again, contended that a much wider discretion should be entrusted to the judge, and that great injustice might be done by making the amount of punishment depend on the consequences of the act. Death might occur in the duel where was the least premeditation and neither party was particularly to blame ; and a slight wound might bring before the jury one of those men “ who refuse to agree to any terms of reconciliation, and whose pretended honour is a cloak to the most revolting barbarity.” The committee therefore suggested, that if the jury affirmed the existence of circumstances of excuse, the accused should be imprisoned at the discretion of the court, for a period not exceeding two years nor less than a month. They also added a clause referring duels between military men in actual service to the jurisdiction of the courts’ martial.¹

This Project of Law was rejected, and from 1828, the date of the judgment of the Court of Cassation, to 1837, duellists enjoyed a complete impunity in France, and the practice of single combat became alarmingly general. Duels were frequently fought out of mere bravado, for no apparent motive but to show that the combatants were not afraid ; and, for a season, challenges solely founded on political differences were carried from one party to the other by the score. If we remember rightly, some fifty Carlist gentlemen left their names one fine morning at the office of the *National*, with an intimation that they were ready to fight an equal number of republicans ; the ground of quarrel being an imputation on the Duchess of Berry’s purity.

The first effectual check was given in 1837, when an occasion occurred for reviewing the whole of the French jurisprudence on the point.

In January 1837, Baron, an attorney of Tours, conceiving himself insulted by Pesson, an agent of that place, gave the

¹ M. Nougarede de Fayet states, that at the time he wrote (1838) the colonels took cognizance of duels amongst the officers, whilst even for the privates there was an officer whose duty it was to investigate the grounds of quarrel and deliver the swords.

latter a box on the ear, which led to a duel. Pesson, as the insulted party, made choice of the sword. Two were brought to the field. On its being observed that Baron was ignorant of the use of the sword, there was some talk of procuring pistols; but Baron declared that he preferred fighting with the sword, because with this weapon he could defend his life. The swords were of different lengths; they drew lots, and the longest fell to Pesson. They crossed swords immediately, and after a minute's contest, Baron received a wound in the breast, of which he almost instantly expired.

A prosecution against Pesson was directed by the law officers, but both the Court of Tours and the Court Royal of Orleans decided that it was not maintainable, on the ground that the act charged constituted neither crime nor misdemeanour.

The question ultimately came before the Court of Cassation, when M. Dupin Ainé, the celebrated orator and advocate, in his capacity of procureur-general, delivered an able and occasionally impassioned argument in support of the appeal.

"The intention of the legislature," he says, "sufficiently appears from the *Exposé des Motifs*, presented by M. de Montseignat in 1810, who expressly stated that duelling was not named, because it was comprised in the general provisions of the law." "Our kings, by creating an exceptional jurisdiction for this crime, had almost ennobled it. They consecrated aggressions on the point of honour in trying to graduate or prevent them; by carrying severity of punishment to excess, they missed the object they were aiming at. It was not for the Project to particularize a species comprised in the genus of which it gives the characteristics."

He also quotes the reply of M. Treilhard, one of the most influential framers of the Code, when asked why they had made no mention of duelling: "We did not wish to pay it the compliment of naming it." If the framers of the Code really thought that they could put down so inveterate a practice by a contemptuous silence, by refusing it a compliment, to use the strange expression of M. Treilhard, which they must have paid to crimes of comparatively rare occurrence and far deeper dye, they entertained strange notions of the powers and duties of a law maker; but the tone of

M. Treilhard's remark was probably misunderstood, and the authority of M. de Monseignat is shown by M. Nougarede de Fayet to be questionable. The best solution of the mystery is, that the emperor, not knowing how to deal with the subject, ordered it to be omitted altogether. He could not have imposed penalties on duelling without offending the army, and repressing the military spirit which formed the best foundation of his throne; whilst, on the other hand, it would have been in the highest degree unwise to legalize it in express terms. The current of decisions during many years immediately following the adoption of the Code, is plausibly adduced in confirmation of this theory.

Most of M. Dupin's argument is drawn from considerations of expediency. The law, he thinks, should declare all single combats criminal, and leave juries to decide in each individual case whether the circumstances were such as to justify an infringement of the rule. To exemplify the discrimination of juries, he exclaims,—

"Gentlemen, remember the verdict of the English jury. A father had killed the ravisher of his young daughter; he avowed his crime, and in his agony he expressed his regret at not having been able to kill the author of his misery more than once. He was acquitted, and all England applauded this decision."

We are unacquainted with the circumstances of this case; indeed we never heard of it before: but unless the killing preceded the consummation of the crime, no English jury could have acquitted the parent, though they might have found him merely guilty of manslaughter.

The peroration was as follows :

"And, surprising fact! amongst the apologists of the duel, are to be found writers and orators who demand the abolition of the punishment of death, who maintain that the right of man over man does not extend so far, and who yet, at the very moment when they are contesting the exercise of this right with society, vindicate it for themselves, and grant it to the first comer! There are laws, there are magistrates,—this signifies nothing! Like the ancient kings, they pretend to derive only from their sword; I do not add from God, for there is no question about God amongst modern duellists! In short, I hesitate not to say, the partisans of the duel show themselves more barbarous than the ancient nations who bore this character. If amongst those uncivilised communities, the custom of

single combat prevailed, it was for want of better laws, which the dark age in which they lived was incapable of supplying. But, in our day, in the presence of laws which have regulated every interest and every right, with magistrates, with tribunals instituted to render justice to every one—to appeal to force and return to the duel, is barbarism, which, at this time, has no excuse.

“Is it this then, judges, that we are called on to proclaim in the sanctuary of justice? And then, people come and complain that the spirit of revolt and insubordination is advancing! And what, I pray you, is insurrection (*l'émeute*), if it be not a grand duel, an armed defiance to society? As for me, my conviction on this question is fixed to the highest degree. Should my efforts prove powerless this time, I would renew them. On every occasion, I will rise against the illegal and immoral practice of duelling; I will relieve my conscience as a public man and a magistrate from the most cutting of remorseful feelings, that of fostering in the bosom of society an homicidal prejudice, and of contracting a sort of complicity in all duels whose frequency and impunity should derive encouragement from the most fatal of all legal errors. Believe me, gentlemen, what is needed under the circumstances which French society exhibits, is not another law, but another decision.”

The Court fulfilled the orator's expectations by upsetting the decisions of their predecessors, and holding that it was not competent to the public officers or chamber of accusation to dismiss a charge of killing or wounding on account of the existence of extenuating circumstances, which it was the exclusive province of the jury to declare.

At present, therefore, the duellist who has the misfortune to kill his man must undergo the ceremony of a trial, but juries almost invariably acquit. If the prosecution be instituted for wounding merely, the accused is in a much worse condition; for then the case is disposed of by the tribunal of correctional police, who, in obedience to the Court of Cassation, generally refuse to take cognizance of the alleged circumstances of extenuation. Notwithstanding this inconvenient state of things, a consciousness of the extreme difficulty of the subject has hitherto deterred any one from proposing a remedy.

Attempts have recently been made in other countries to repress the custom, but they do not appear to have been attended with success. One of the strangest is a project of law proposed in the United States, which provides that, in case of death, the survivor shall be liable for the debts of the

deceased ; that, in case of wounding or maiming, the eldest child or other nearest relation shall have his action for damages, and that the declaration of the dying man, proved by his second, shall be sufficient evidence of his liabilities.

M. de Chatauvillard, from whom we copy this project, reasonably objects that it opens a wide field for a new description of roguery. A ruined and unprincipled man will no longer recur to suicide: his life is worth so much money: he will insult some rich man who will kill him and enrich his family, or wound him and pay his creditors. A set of desperadoes will cast lots for the post of danger, and share the profits. Some of their number may play the part of creditors, and in case of death the second will be an all-sufficient witness. The disadvantage under which a law of the kind would place the richer class was probably deemed a justification of the proposal in the United States, but there is not a country in Europe where it would be deemed worthy of serious discussion. We mention it as a legislative curiosity.

In Russia, Prussia, Saxony, Wirtemberg, Hanover, Hesse, Baden, Switzerland, New York, the Papal States, and Belgium, the experiment of specific laws against duelling has been tried. The most recent, and in some respects most remarkable, of these laws is the Belgian, passed no longer ago than 1838, after five years of discussion, so that it may fairly be supposed to embody the best suggestions of modern lawgivers. According to this law, a challenge is to be punished by from one to three months' imprisonment, and a fine of from five to five hundred francs (Art. 1). Those who publicly decry or speak ill of a person for having refused a duel, incur the same punishment (Art. 2). Any one who has excited to a duel, or who by an affront of any sort has given occasion for a challenge, is to be punished with from one month's to a year's imprisonment, and a fine of from 100 to 1000 francs (Art. 3). The punishment for the mere use of a weapon against an adversary is imprisonment from two to eighteen months, and a fine of from 200 to 1500 francs (Art. 4); for killing, from one to five years' imprisonment, and a fine of from 1000 to 10,000 francs (Art. 5); for wounding so severely as to cause any malady or incapacity for work during twenty days, from six months to three years' im-

prisonment, and a fine of from 500 to 3000 francs (Art. 5); for less serious wounding, imprisonment from three months to two years, and fine from 400 to 2000 francs (Art. 6). The accomplices are to be visited with the same punishment as the principals, and all are to be reputed accomplices who by gifts, promises, threats, abuse of power, or culpable machination, have permitted the commission of the offence (Art. 7). The jurisdiction of the courts martial is reserved, but the military man who fights with a civilian is to be subject to the civil jurisdiction, even when no prosecution has been instituted against his adversary (Art. 9). In cases within the first four articles, if extenuating circumstances appear, the courts are empowered to reduce the imprisonment to six days, and the fine to sixteen francs.

A very able commentary on this law, from the pen of M. West, a French advocate of distinction, appeared in the April number of the excellent French review to which we have had such frequent occasion to refer.¹ The writer sees no reason (nor do we) for limiting the effect of extenuating circumstances to cases where there has been neither death nor wounding, and he indicates as a clear sign of the difficulty in which the lawgiver found himself, the punishment denounced against any one who by an affront of any kind (*injure quelconque*) shall give occasion for a challenge, thus making the punishment for an affront dependent on the susceptibility of the person affronted.

He commends the article regarding accomplices, which implies that seconds,² in the English meaning of the term, are not to be punished. Without their intervention it is obvious that duels would become more fatal; but they should be made strictly answerable, not merely that no advantage has been taken on the ground, but that every mode of conciliation have been tried. M. de Chateauvillard quotes as an aphorism, '*ce ne sont ni les balles ni les épées qui tuent, ce sont les témoins*;' and we can hardly conceive a quarrel which may not be settled by mutual concession unless a blow has been struck, or the insult has been of the deepest

¹ *Revue Etrangère et Française*, &c. edited by MM. Fœlix, Duvergier, and Valetti.

² M. de Chateauvillard applies the term *seconds* to the friends, who, according to the old custom, engaged at the same time as their principals.

die. The severity of the English law regarding seconds is oddly enough the main cause of the practical impunity accorded to duellists. No man is bound to criminate himself, and consequently, no man who can in any sense be deemed aiding and abetting, is compellable to give evidence.

Professor Mittermaier, the celebrated German jurist, observes : "It is a mistake to suppose that a severe punishment inflicted on seconds will have the effect of hindering every one from undertaking the trust; seconds will be found, but less energetic, less intelligent, incapable of managing such matters, or duels will take place without seconds, which is still more dangerous. The legislator ought to look to the state of things such as it exists."

Looking to the state of things as it exists in Great Britain, our opinion is that the legislature had better do nothing. The practice is rapidly wearing out, and a single false step might bring about a reaction. We are not going to argue over again the old question, whether duelling be an evil on the whole; but it is clear, from the experience of all civilized countries for ages, that it can never be suppressed by laws, until laws be also found to repress that peculiar description of injury for which what is called the satisfaction of a gentleman is required. Were the privilege, or assumed privilege, restricted to a class, as when the jurisdiction of the marshals of France was established, there might be some hope of instituting courts of honour; but in the present mixed condition of society, the notion is chimerical. It is surprising, however, that something of the sort has not been attempted by the officers of the army and navy, who have a tribunal admirably adapted for the purpose in the mess-table. Of late years these matters have been worse managed by military men than by any others; witness, amongst many equally striking illustrations, the famous *fracas* in the Blues, and an affair that has recently filled column after column in the newspapers. In each instance, blows were struck in the public streets, at the risk of bringing on a boxing match, apparently under the express sanction of naval or military authority. Yet surely all men of sense and spirit are agreed that nothing short of direct instantaneous provocation can ever excuse, much less justify, a blow. It is the more important that officers of the army

and navy should adopt speedy steps for inculcating juster notions of the point of honour amongst their younger brethren, because their example is pretty sure to be followed by the rest of the community, and a few judicious regulations steadily enforced, would ensure the arrangement of future differences without public scandal.

At all events, the more we consider the subject, the more are we convinced, that all that can be done must be done by opinion, and that the non-interference policy is the best. What has been the result of specific prohibition in the countries above enumerated? Why, in every one of them, to the best of our belief—and we need hardly say that the observation applies equally to England and France—any military man who refused a challenge, or put up with an affront, would be obliged to quit his regiment; and a civilian, moving in the higher circles of society, would find his position rendered extremely uncomfortable by a similar act of moral heroism. Instances might occur in which a contrary line of conduct would be duly appreciated. Thus, we think the Marquis of Londonderry should have declined to meet Mr. Grattan, and the Duke of Wellington would not have fallen in public estimation had he refrained from challenging Lord Winchilsea. But, speaking generally, forbearance would be perilous for any one who had not established a very high reputation for courage or conscientiousness. How, with such a state of public feeling, is it possible to inflict a severe, much less a degrading, punishment on a duellist, who accepts or sends a challenge under circumstances manifesting nothing more than the ordinary degree of culpability?

H.

(For the English law on duelling, see 10 L. M. 367.)

ART. VI.—STAMP DUTY ON THE MORTGAGES OR SECURITIES
OF BUILDING SOCIETIES.

MANY societies have been formed throughout the country, under the act of 6 & 7 Will. IV. c. 32, for the purpose of raising funds to enable the members respectively to purchase or acquire real property.

Generally speaking the plan of these societies is in effect as follows :—The members have power to subscribe for one or more shares of 120*l.* each, or half shares of 60*l.* each ; and in order to raise the proposed capital, a subscription is made by every member of 10*s.* per lunar month for each share, and 5*s.* per lunar month for each half share. The members are also subject by the rules to the payment of certain fines, and a forfeiture of shares may also be incurred, by which of course the capital stock of the society would be increased, and the raising of the necessary amount for the shares of each member would be accelerated. When the society has acquired sufficient funds, the privilege of having the amount of a share or shares paid in advance is sold by ticket to the highest bidder among the members, and for such a premium per share as can be obtained : and this privilege is deemed of so much importance, that frequently a considerable premium, say 30*l.* per share, is obtained ; and of course the capital stock of the society may be much increased by the premiums, and the object of the society still further accelerated. The rules require that the premium shall be paid by monthly instalments, the payment of the first being generally deferred for four or five months. But the rules provide, that when a member receives the amount of his share or shares in advance, he shall convey sufficient property to the trustees of the society to secure the due payment of his monthly subscription, and of the premium monies, and also of interest for the share monies advanced, besides the fines and all other monies which may become due from him to the society, pursuant to the rules. The security or mortgage in question is, in fact, to insure the due observance of the rules of the society by the member receiving his share monies in advance ; and if it is made generally in such terms it is quite sufficient, for the rules, which are inrolled pursuant to the act,

provide very particularly for all the payments to be made by a member who receives his shares in advance.

If the society has existed for some time before a member receives the amount of his shares, it is obvious that the payment made to him is in part in satisfaction of monies already contributed by him, and as to the remainder it is not to be specifically repaid by him; for, from various causes alluded to above, the capital of the society may become sufficient to pay the amount of all the shares before the regular monthly subscription would have amounted to the necessary sum. When the facts of the case are clearly understood, it is plain that the mortgage or security given by members of building societies, on receiving the amount of their shares in advance, is not a security for the payment of any definite and certain sum of money.

A question, however, has been raised, whether the security deeds in question should not be impressed with an *ad valorem* mortgage stamp for the amount of the shares paid in advance.

We may, 1st, advert to the general rule applicable to the construction of the Stamp Acts. "Acts of parliament imposing duties are so to be construed as not to make any instruments liable to them, unless manifestly within the intention of the legislature."¹—Per Lord Tenterden, C. J. "It is a well-settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language."²—Per Mr. Justice Bayley. The Stamp Act is to be construed *literally*.³ It should also be observed, that the Stamp Act imposes heavy penalties and forfeitures.

Now, according to the present Stamp Act, a deed is subject to the *ad valorem* mortgage duties, if made as a security "for the payment of any definite and certain sum of money advanced or lent at the time, or *previously* due and owing, or forborne to be paid, being payable;" or if made as a security "for the repayment of money to be thereafter lent, advanced, or paid;" that is, of course, by the party taking the security. The Stamp Act therefore only contemplates three cases, a present loan, a previous or present debt, and a future loan or payment.

¹ 8 Barn. & Cr. 542; and see 2 Barn. & Ad. 869.

² 4 Barn. & Cr. 245.

³ See *Wood v. Norton*, 9 Barn. & Cr. 885; 7 Mee. & W. 419.

Now, a security granted to the trustees of a building society, if properly drawn, is not, as has been already shown, within the language of these enactments. The monies secured, except the premium monies, are wholly indefinite and uncertain, and cannot be ascertained by any calculation whatever; for they in fact depend upon the time when the mortgage is granted, and upon the continuance of the society, the duration of which it is plain cannot be ascertained; for the rules provide, that it shall continue until each member has received the amount of his share monies, which may be accumulated sooner or later, according to the amount of premium monies, and fines and forfeitures received by the society: and the time, too, must of course be dependent upon losses sustained by the society.

As to the premium monies, they certainly are a definite and certain sum of money, but then they come not within the words or qualification, "advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable."

Of course the second clause, providing for a security for the repayment of money to be thereafter lent, advanced, or paid, has no application to the transaction in question.

If, then, the security in question is not subject to any ad valorem mortgage stamp, it does not appear that there is any other stamp to which it can be liable, other than for a deed not otherwise charged.

It has, indeed, been contended, that the securities in question are exempt from all stamp duties whatever, because it is enacted in the act above referred to, that the provisions of the Friendly Society Act, 10 Geo. IV. c. 56, so far as the same may be applicable to the purposes of any benefit building society, and to the framing and altering the rules thereof, shall extend and apply to such benefit building society, and the rules thereof, in the same manner as if such provisions had been therein expressly re-enacted; and the 10 Geo. IV. does contain a clause exempting all instruments and assurances required by any friendly society from stamp duty: but then the act of 6 & 7 Will. IV. c. 32, for the regulation of Benefit Building Societies has a special clause as to exemption from stamp duties, and that does not extend to mortgages, so that it would be quite inconsistent with the ordinary rules for con-

struing acts of parliament, to admit the clause imported into the act by a general reference, to add a term to the special exemption, "*Generalis clausula non porrigitur ad ea quæ specialiter sunt comprehensa.*"¹

The wisdom of the general rule of construction adopted by the Courts with reference to the Stamp Act is strongly shown by opinions which have been given by certain eminent conveyancers, as to the proper stamp duty for the securities of a building society. One opinion is, that there should be an *ad valorem* stamp for the amount of the share monies advanced to a member; and another, that such a security should have a stamp for an unlimited amount, unless the deed expresses a limit. Now these opinions, with deference be it said, plainly proceed from a caution which refuses to be bound by the definitions of the act, and which receives no countenance from any decided case or principle of law. Really their only ground is, that the securities in question are called mortgages, for there is nothing better they can rest upon. This shows, we repeat, the danger that would arise if any speculation were admitted into the construction of the Stamp Act; the most eminent men would be found to differ, with the plainest words and facts before them.

W. C. W.

ART. VII.—INDEMNITY SECURITY.

BANKERS and other persons frequently take an indemnity security for the whole or part of the debt or balance that may become due to them, and such security is commonly a joint and several bond or promissory note from the principal and his surety, and sometimes a separate guarantee or other instrument from the surety. If the principal become bankrupt or insolvent, and the debt exceeds the indemnity, and the creditor receives dividends from the insolvent estate upon the whole debt, he generally expects that the sum to be paid by the surety should go in or towards satisfaction of the sum which remains due after deducting the dividend, and this we believe is the common understanding and intention. It is not intended that the surety should take any part of the prin-

¹ 8 Co. 118 b.

cipal's estate till the creditor has been paid in full. But this is not the law, and the rule upon this subject is principally derived from a decision made by Lord Eldon in the year 1805.¹ There A. B. and his surety C. D. gave a joint and several bond to the bankers of A. B. in the penal sum of 10,000*l.* conditioned to be void on payment of all monies which might become due from A. B. A. B. became bankrupt, and the debt then due to his bankers amounted to 20,000*l.*, which was proved by them under the commission. The surety subsequently paid 10,000*l.*, the amount of the penalty of the bond to the bankers, and it was held that he was then entitled to a rateable proportion of the dividends on the proof made by the bankers. Lord Eldon's argument was that the indemnity from the nature of the obligation could not be carried beyond 10,000*l.*, and that being expressly limited by the bond, the inference was that the debt was not to be extended beyond 10,000*l.* to the prejudice of the surety. He said, "take the case of two sureties each for the separate sum of 10,000*l.*, each paying the principal creditor would be entitled to stand in his place for the sum paid;" that is, assuming that the debt of the creditor did not exceed 20,000*l.* In such a case it may be observed the creditor would have received the whole amount of his demand before the sureties took any thing from the estate of the principal debtor. But in the case before us the effect of the decision was not to give the bankers an indemnity to the extent of 10,000*l.* against any loss they might sustain by giving credit to A. B., but simply to enable them to transfer part of the debt due from A. B. to the account of C. D., and thus to give C. D. a right to come against the estate of A. B. in competition with themselves. We suspect then that Lord Eldon's decision on this "perfectly new case," as he termed it, did not accord with the real agreement between the parties.

The next case, *Paley v. Field*,² we think was still further from effecting the real intention of the parties. In that case there was also a joint and several bond by a principal and his surety given to bankers in the penal sum of 3000*l.* with a proviso that the surety should not be answerable for or liable to pay more than the sum of 1500*l.*, the meaning of the par-

¹ *Ex parte Rushforth*, 10 Ves. 409.

² 12 Ves. 435.

ties being, that the bankers should not be indemnified by the surety for any loss which they should sustain by giving credit to the principal beyond the sum of 1500*l.* and interest; but the condition of the bond was general for securing all sums that should become due from this principal to the bankers. Now we think that the real meaning of the transaction was, that if the bankers would give credit to the principal, the surety should pay all sums that the principal did not, so only that the surety was not required to pay beyond the sum of 1500*l.* But the principal having become bankrupt and the bankers having proved a debt of 3000*l.* upon the bond, and having received dividends upon that sum, Sir W. Grant, M.R. decided that the surety having paid the sum of 1500*l.* was entitled to the dividends upon that amount.

It seems to have been thought that the case of *Martin v. Brecknell*¹ was decided upon the same principle as the cases just cited, but that case seems to us very different. There a sum of 9000*l.* was secured by the joint and several bond of a principal and his surety to be paid by successive annual instalments; after some of the instalments had been paid, the principal became bankrupt, and the creditor proved for the whole amount remaining due and received dividends accordingly. He subsequently sued the surety for an instalment, which became due, and it was held that he was entitled to recover the amount of the instalment, deducting the dividend received in respect thereof. This decision, it is obvious, did not give to the surety any part of the principal's estate whilst the creditor remained unpaid.

By the 49 Geo. III. cap. 121, sec. 8, it was enacted that if a surety paid the whole debt or any part thereof in discharge of the whole, he should be entitled to the benefit of the proof made by the creditor, or to prove himself if the creditor had not already proved; but we do not think that this enactment sanctioned the principle of the case of *Paley v. Field*, cited above; for, according to the facts of that case, we think it should have been held that the surety was not only answerable for a debt of 1500*l.*, but was to the extent of 1500*l.* to be answerable for any deficiency which there might be after the estate of the principal had been exhausted, and conse-

¹ 2 Mau. & Sel. 39.

quently, till such loss was paid to the extent of 1500*l.*, the surety could not be said to have paid the debt for which he became liable.

It is obvious that the enactment just cited was not considered to conclude the question, for the same point was in the year 1815 again brought before Lord Eldon, and his decision was in conformity with the cases cited above.¹

In *Bardwell v. Lydall*² the same point arose in an action of *assumpsit* upon a guarantee, but the instrument of guarantee was not for the payment of any loss that might be sustained by the creditor, but for the payment of the debt which might accrue due to him to the extent of 500*l.*, and the Court of Common Pleas, adopting the argument of Lord Eldon given above, held that the surety upon payment of the sum guaranteed by him was entitled to a proportionable part of a dividend received by the creditor from the estate of the principal debtor.

In *Ex parte Holmes*,³ where an accommodation acceptance had been deposited with bankers as a general security for their balance, it was held by the lord chancellor that the acceptor having paid the amount, he was entitled to receive from the bankers the amount of dividends they had recovered from the estate of the principal debtor in respect of a proportionable part of the debt proved by them, the bankers having proved a large debt, and having exhibited the accommodation acceptance as a general security, as it was in fact admitted to be.

In *Ex parte Sherrington*⁴ A. became surety for B. to a banking company for 750*l.*, and B. deposited a lease with A. as an indemnity against his liability. B. became bankrupt, and the banking company proved 1100*l.* against the estate of B., and called upon A. to pay 750*l.* A. then applied to the Court for an order for sale of the leasehold estate, and an order was made that the same should be sold by the assignees, and that the sale monies should be paid into the Bank of England, and that the banking company should be at liberty to apply to the Court to receive such monies upon their undertaking to expunge so much of their debt proved, as the net

¹ See *Ex parte Brook*, 2 Rose, 334.

² 7 Bing. 489.

³ 1 Mont. & Chit. 301.

⁴ 1 Mont. Dea. & De G. 195.

proceeds to be received by them should amount to; and in the event of the banking company not applying them, the petitioner was to be at liberty to apply to the Court relating thereto; that for so much of the sum of 750*l.* as the net proceeds were insufficient to pay upon the same being expunged from the proof of the banking company, the petitioner should be admitted a creditor under the fiat, and be at liberty to receive dividends on his proof.

The law being thus settled, the only question is, how the real intention and object of the parties can be best effected. The object is assumed to be that the surety should not take any part of the debtor's estate until the creditor is paid his whole debt. We think a guarantee to the following effect would be sufficient: "In consideration of the — banking company (of whatsoever members the same may for the time being consist¹) allowing time and giving further credit to A. B., I hereby guarantee to the said company (but only to the amount or extent of 500*l.*) the payment of the debt or sum now due and which shall at any time hereafter be due to them from A. B. And should A. B. become bankrupt or insolvent I agree that the said company shall prove for the whole amount then due to them from A. B., and shall receive all dividends that shall be paid out of his estate upon or in respect of such proof until the said company shall be paid 20*s.* in the pound, and this notwithstanding they may have received from me a part or the whole of the said sum of 500*l.*, and in confirmation of this guarantee I have given to the said company my promissory note for 500*l.* Witness my hand this — day of — 1841." Such an agreement would require a stamp of 1*l.*, and if not stamped at first might, we believe, be stamped at any time upon payment of a penalty of 5*l.* It is no objection to a guarantee that it was not stamped at the time of the bankruptcy. The Court do not look at the date of a stamp.²

If a surety guarantee the payment of a debt or balance generally without any limit, and the principal debtor become bankrupt, and the creditor proves for the whole amount, no deduction can be made from the proof, nor can the right of

¹ See *Dry v. Davy*, 10 *Adol. & Ell.* 30.

² *Ex parte Nicholson*, *Jurist*, November, 1840, p. 1066.

the creditor to receive the dividends be impeached until the surety has paid the whole debt.¹

And so if a surety gives real or personal property as a guarantee, and the creditor receives the proceeds of it, he may still retain a proof for the whole amount of his debt, and receive dividends accordingly, as appears by the cases we now cite.

In *Ex parte Parr*² the petitioners were the holders of bills of exchange drawn upon the firm of Brumell, Heyliger & Co. and accepted by Leigh and Armstrong; the acceptors being unable to take them up, the petitioners applied to the drawers, who assigned to the petitioners a plantation in South America as a security for the balance then owing upon the bills. The acceptors having become bankrupt, the petitioners claimed to prove for the whole debt, but the commissioners refused to admit the proof without deducting the value of the security. But the Lord Chancellor Eldon decided in favour of the petitioners, saying, "the deduction of a security is never to be made in bankruptcy but when it is the property of the bankrupt."

In *Ex parte Peacock*,³ a creditor of a firm had a mortgage security from one of the firm, who died, and immediately after, the surviving partner having become bankrupt, it was decided by the lord chancellor that the creditor was entitled to prove against the joint estate without giving up his security. It has been doubted whether the decision would have been the same, if the party who gave the security had not died.⁴

In *Ex parte Adams*⁵ the facts were nearly similar, and the decision was the same, Sir George Rose observing, "*Ex parte Peacock* and the other decisions clearly show that the proof is not to be reduced by the amount received. It has become almost a maxim in bankruptcy that security is never to go in reduction of a proof unless the property of an estate against which the proof is tendered."⁶

If a debtor deposits acceptances or other securities, which are his own property and not merely accommodation paper,

¹ *Ex parte Coplestone*, 1 Mont. & Chit. 262.

² 1 Rose, 76.

³ 2 Gl. & Jam. 27.

⁴ 1 Mont. Dea. & De G. 313.

⁵ 3 Mont. & Ayr. 157.

⁶ S. P. 1 Mont. Dea. & De G. 109.

as a security for a debt or balance, and he becomes bankrupt, and after proof some of the acceptances are paid, the proof must be reduced, for part of the bankrupt's property has come home to the creditor, and he cannot have the whole of part and part of the whole, or in other words he cannot claim a dividend upon the part he has actually received in full, and it seems to be immaterial whether the bills deposited are indorsed by the bankrupt or not.¹

We may observe that it has lately been decided that if two persons, A. and B., *not being partners*, give a joint note for securing the debt of B., who afterwards becomes bankrupt, the creditor may prove for the whole debt notwithstanding the solvency of A.²

W. C. W.

ART. VIII.—AS TO A SALE UNDER A POWER IN A MARRIAGE SETTLEMENT, THE TENANT FOR LIFE HAVING MORTGAGED HIS ESTATE.

By indentures, dated 9th and 10th of May, 1816, certain lands were, upon the marriage of Isaac Cowling, who was then seised in fee thereof, subject to an annuity of 300*l.* to his mother for life, conveyed to the following uses: To the use that the trustees should, during the life of Isaac Cowling, receive an annual sum of 150*l.*, and apply the same as therein mentioned; and it was declared, that, subject as aforesaid, the grant and release thereby made should, after the solemnization of the marriage, enure to the use of the settlor for his life, with divers remainders over in strict settlement, with the ultimate remainder to the settlor, his heirs and assigns; and among other powers it was provided, that it should be lawful for the trustees, and they were thereby required, upon any request in writing of the settlor during his life, and after his decease at the request in writing of the guardian or guardians of any minor entitled to the receipt of the rents and profits, to dispose of the settled property either by way of sale or exchange.

It appears, that previously to the year 1824 several parts of

¹ Ex parte Brunshill, 3 Mont. & Agr. 220; 10 Ves. 419.

² Ex parte Buckingham, 1 Mont. Dea. & De G. 235.

the settled property were sold under the aforesaid power, and that part of the proceeds of the sales, amounting to the sum of 5213*l.*, were lent by the trustees to the tenant for life, Isaac Cowling; and by an indenture, dated 2nd March, 1824, he demised such parts of the settled property as remained unsold unto the trustees, their executors, administrators, and assigns, for the term of ninety-nine years, if he, Isaac Cowling, should so long live, subject to the charges mentioned above, and subject also to a proviso for cesser of the term on payment of the said sum of 5213*l.*, and such other sums as should be advanced by the trustees to Mr. Cowling, not exceeding the sum of 8000*l.*

By an indenture, dated the 24th February, 1825, Mr. Cowling demised the same premises unto certain bankers for the term of ninety-nine years, if he should so long live, to secure the balance of his banking account.

In the month of November in the same year Mr. Cowling became bankrupt, and assignees were chosen on the 2nd December in that year.

By an indenture, dated the 3rd March, 1826, and made between the said bankers of the first part, the said assignees of the second part, and Isaac Cowling of the third part, after reciting that Cowling had obtained his certificate, and that he had agreed with the said bankers and the said assignees for the sale to him of the said hereditaments for the sum of 735*l.*, which it had been agreed should be paid to the said bankers in part satisfaction and discharge of the balance then due to them on the account of Cowling, the said bankers and assignees assigned all the said premises unto Cowling, his executors, administrators, and assigns for the residue of the said term of ninety-nine years, granted by the said indenture of the 24th February, 1825, and for and during other the estate, term, and interest of the said bankers and assignees therein.

It will be observed that the freehold, during the life of Cowling and his remainder in fee, was vested in his assignees under his bankruptcy by operation of law, and it does not appear that such estates have been reconveyed; it is clear, therefore, that whilst such estates are outstanding the power of sale in Mr. Cowling's marriage settlement cannot be exercised; but we will assume that Mr. Cowling can purchase such estates

and procure them to be reconveyed to him by the assignees, and that the mortgage to the trustees of the settlement, by the indenture of the 2nd March, 1824, is the only remaining incumbrance; and the question will then be, whether, under all the circumstances, the power of sale in the settlement can be exercised during the continuance of that mortgage.

It is clear, that in a common case a mortgage by a tenant for life does not prevent the exercise of a power of sale; (see *Walmesley v. Butterworth*, Appendix to Coote on Mortgages, p. 698;) but it will be observed that the present is not the common case of a mortgage. By his certificate under his bankruptcy, Mr. Cowling is discharged from the debt due from him to the trustees of his settlement, and consequently we must assume those trustees are now in the actual receipt of the rents of the settled property, and that after paying the annuity to Mr. Cowling's mother, and the annual sum secured by the settlement, the residue of such rents will be applied towards reducing the principal; and as the settled property appears not to be extensive, several years must elapse before such mortgage debt is completely discharged, and in the meantime Mr. Cowling cannot be said to have any beneficial interest whatever in the property, for he may die before the mortgage debt is wholly discharged. It is clear the assignees thought Mr. Cowling's interest, subject to the mortgage to the trustees, worth nothing, for they joined in the assignment of 3rd March, 1826, without any benefit whatever to the estate of the bankrupt.

From the observations of Lord C. J. Abbott, in the case of *Long v. Rankin*, which arose upon a power of leasing, (reported in the Appendix to Sugden on Powers, No. 2,) it would seem to have been his opinion that a transfer of the estate of a tenant for life, to whom a power is given, will not extinguish the power, unless it be clear in the language of the deed, whereby the power is created, that the donor intended to annex it inseparably to the estate for life, and to a continuance of that estate in the identical person to whom it is given; see 2 Sug. Pow. 546. But in *Long v. Rankin* the alienation of the life estate was only by way of security, and express provision was made for the preservation of the power; and in the case of *Tyrell v. Marsh*, 3 Bing. 31, the alienation was

by way of security, and the incumbrancer consented to the exercise of the power. In no case has the power been held to be exercisable after an absolute alienation by a tenant for life: and in a case mentioned by Sir Edward Sugden, in his *Treatise on Powers*, vol. i. p. 74, which we think a much stronger case in favour of the existence of the power than the present, the parties deemed it advisable to obtain a private act of parliament. The case of an absolute alienation by the party, and an absolute alienation by operation of law, as by bankruptcy, appears to be governed by the same principles. And with respect to the mortgage security to the trustees there is the further objection, that the trustees could not effectually release the property sold from their security.

Under the above circumstances we think it very doubtful whether a Court of Equity would consider Mr. Cowling competent to exercise the power of sale in his settlement during the continuance of the aforesaid mortgage; for the very reason alleged by the Master of the Rolls, in deciding the case of *Walmesley v. Butterworth*, was, that the merely mortgaging the life estate is not, in the ordinary affairs of mankind, considered as parting with the estate itself; and here this reason does not apply, for Cowling has, for a time at least, parted with his estate, and may never recover the dominion of it.

On principle there seems to be a strong objection to allowing a tenant for life in Mr. Cowling's situation to exercise a power of sale, for he has an evident interest in endeavouring to increase the annual income of the settled property by changing the land into money, and in keeping it as money, contrary to the intention of the settlement, and to the prejudice, or at least at the risk, of the parties entitled in remainder. In this respect there is a great difference between merely granting a lease, from which a tenant for life can derive no advantage which does not equally accrue to his successor, and absolutely disposing of an estate. Besides the risk of keeping the price as money, and the expense attending on the purchase of another property, the remainder men may be great losers by a sale at an improper time. This distinction was not adverted to by the Master of the Rolls when he relied on the case of *Long v. Rankin*; and it was rather a strong assertion for his Honor to make, that that case confirmed Ken

v. Bulkeley, when Lord Eldon, in assenting to *Long v. Rankin*, expressly protested against such an inference being drawn from it. It must be observed, that in this case the power of sale is in fact vested in Mr. Cowling himself; the trustees have no discretion: this is an additional reason why Mr. Cowling should be free from any bias of personal interest.

W. C. W.

ART. IX.—ASSIGNABILITY OF PAY AND PENSIONS.

AMONGST the various descriptions of property which exist, the pay and pensions of public servants offer peculiarities in their incidental rights which distinguish them from most others, and render the rules and principles of law which affect them subjects of interesting and useful observation. This inquiry is at present more frequently required by reason of the many changes, economical and otherwise, daily introduced into established institutions. These are nearly always accompanied by the granting of pensions and allowances to persons who cease to hold or fully to enjoy offices and emoluments which are abolished or materially reduced. Although this remark applies more directly to pensions than to pay, the latter forms a necessary element in the inquiry, inasmuch as pensions, being usually substituted for it, partake of some of its qualities and characteristics. Hence we find that the cases which have occurred in our Courts on the subject of pay, are constantly referred to in the cases which arise on pensions.

In the course of the following remarks, it will also be seen that another denomination of property (*viz.*), contingent interests, is also involved in the discussion. Independently of such circumstances, however, these interests cannot fail to be a topic of profitable consideration, as exhibiting, in a striking manner, the distinctions which exist between the two great branches of our jurisprudence, law and equity, and the convenient adaptation of the latter to exigencies which the more rigid rules of the former cannot be made to meet.

It has been long settled that military and naval full pay and half pay are not such descriptions of property as the pos-

essor can dispose of prospectively, so as to confer upon an alienee the right to receive the future and accruing payments for his own benefit. The leading principle upon which this rule has been established is, that these emoluments are granted for the protection and promotion of the interests, dignity, and advantage of the state. With respect to full pay, which is a remuneration for active service, there is an obvious reason against the receiver being allowed to deprive himself of it, in the fact that it supplies the means of keeping up his station, and enabling him to perform its duties with propriety.

Although this reasoning will not equally apply to half pay, there is another ground for prohibiting the alienation of the latter, namely, that it is a retainer for future services as well as a reward for past.

Upon a review of the cases which are reported on the subject of pay and pensions, we shall find that the above principles have constituted the main foundation of the decisions pronounced, while others have been occasionally enunciated which will lead us to the inquiry more immediately connected with the alienation of contingent interests.

Before we advert to the authorities which have now completely determined the non-assignability of pay, either at law or equity, it may be remarked that there was a period of time when a different doctrine seems to have prevailed in the equity Courts.

In a case of *Gomez v. Graham*, decided at the Rolls, just a century ago, it appears by the register's book, that the bill was filed by Gomez, a money lender, against Graham, fort major, and Philips, governor of Annapolis Royal, in Nova Scotia, and Gould, who was agent to the garrison. Graham had assigned his *growing* pay to the plaintiff, to secure an annuity of 30*l.* during his life. The case was heard at the Rolls on the 20th June, 1741, *ex parte*, the defendant not appearing, and it was ordered that the defendants, Philips and Gould, should pay the plaintiff what was due to the defendant Graham, for his salary as fort major, at and from the time they had notice of his having assigned such salary to the plaintiff by deed of the 17th June, 1737. The cause was reheard before the Lord Chancellor on the 22d of May, 1742. The Lord Chancellor partially reversed the decree of the

Rolls, and directed the account to be taken from the time of Gould's putting in his answer, and decreed that Gould should thereout pay the arrears of the annuity and costs, and continue to pay the quarterly payments thereof out of the pay, so long as Graham should be entitled to such pay and the said annuity should continue.

In a case of *Stuart v. Tucker*, in the year 1777, reported in 2 William Blackstone, 1137, it was held by the Court of Common Pleas, that after a lieutenant of marines had assigned his pay for securing an annuity, he could not maintain an action of assumpsit to recover it from the paymaster as money received to plaintiff's use. The judgment expressly proceeded upon the authority of *Gomez v. Graham*; the Lord Chief Justice De Grey saying, that it had been thereby decided that such a property was assignable in equity, and that the lieutenant, having thus parted with the use, must be nonsuited. Mr. Justice Gould was of the same opinion, though at law the pay was not assignable.

We have thus seen that formerly the interests under consideration were not only treated by Courts of equity as clearly assignable, but that transfers of them were also recognised by Courts of law. We shall now proceed to ascertain when a different rule was established, and both sides of Westminster Hall concurred in refusing to enforce alienations of pay, whether voluntarily made to a particular assignee, or under the compulsory provisions of the bankrupt or insolvent laws.

In the year 1790 occurred the case of *Flarty v. Odum*, 3 Term Reports, 681, which arose on a rule to show cause why the defendant, an insolvent debtor, should not be discharged. The only question was, whether his half pay, as a lieutenant in a reduced regiment of foot, should be included in his schedule. Lord Kenyon said, "I am clearly of opinion that this half pay could not be legally assigned by the defendant, and consequently that the creditors are not entitled to an assignment of it for their benefits. Emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it. It would, therefore, be highly impolitic to permit them to be assigned; for persons who are liable to be called out in the service of their country, ought not to be taken from a state of

poverty. Besides, an officer has no certain interest in his half pay, for the king may at any moment strike him off the list. Indeed, assignments of half pay have been frequently made in fact, but they cannot be supported in law. It might as well be contended that salaries of the judges, which are granted to support the dignity of the state and the administration of justice, may be assigned."

Mr. Justice Buller said, that if the question had been whether the pay which was actually due might be assigned, he should have thought it, like any other existing debt, assignable, but that did not extend to future accruing payments.

Here then we have the inalienability of pay completely fixed at law; and in the case of *Stone v. Lidderdale*, 2 Anstr. 533, we have the satisfaction of perceiving our equitable tribunals pursuing the same track. In this case the defendant, Lidderdale, through whom the plaintiff, Stone, claimed, had assigned his half pay as a military officer for securing an annuity, and notwithstanding this assignment, had recovered a judgment at law for it against the paymaster of the forces. This bill was then filed on the equity side of the Exchequer to have the benefit of the security for the annuity. Chief Baron Macdonald decided, in conformity with the legal authorities, that an officer could not part with his pay, and that the assignment was invalid in equity. In giving judgment he said :

"Half pay is intended by the state to provide decent maintenance for experienced officers, both as a reward for their past services and to enable them to preserve such a situation that they may always be ready to return into actual service. It materially differs, therefore, from the general case of *expectancies*, which certainly may in equity be assigned. By such assignment no public interest is thwarted. Thus a pension is equally uncertain as half pay; but as no future benefit is meant to arise to the state from granting it, a material distinction arises between them.

The difference pointed out by the chief baron between pay and pensions brings us to the consideration of the latter.

It is plain that a pension, having reference only to *past* services, or being merely a compensation for the loss of emoluments on the abolition of an office, its alienation is not open to the same objections as pay. Hence, where pensions have

been granted to a party and his assigns, or for life, or any definite period, they are clearly capable of assignment. As to those pensions, however, which are dependent on the will of the grantors, a very material question arises as to the validity of their alienation, from the difficulty of investing them with any substantial or tangible character.

Before we consider the power of the grantees of pensions to alien them, it will be necessary to ascertain how such interests have been regarded by Courts of law, and to what extent they have been treated as the property of the pensioners themselves.

The cases which have occurred are of recent date. The first to which we shall advert is *In re Smyth*, 4 Adol. & Ellis, 979. Mr. Smyth, having for several years held the office of paymaster of Exchequer bills, became incapacitated from bodily infirmity, and the Lords of the Treasury in 1826, under the authority of the statute 3 Geo. 4, c. 113, granted him a superannuation allowance. A letter was sent to Mr. Smyth by the secretary of the Treasury, stating that a vote of the pension would be submitted to parliament; and afterwards another letter, informing him that he might receive his pension, together with the arrears, on application to the paymaster. Some disputes afterwards arose between Mr. Smyth and his former colleagues in the office, and payment of the pension was delayed for some time. At length the Lords of the Treasury refused to pay Mr. Smyth, unless he submitted to certain conditions as to the settlement of these disputes. Mr. Smyth applied to the Queen's Bench for a mandamus against the Lords of the Treasury, to compel them to pay the pension. The Court granted the writ as to the arrear, on the ground that, to that extent, they were actual depositories of the money for Mr. Smyth.

Lord Denman said, "The statements in the letters make the Lords Commissioners the depositories of Mr. Smyth's money, and they are not entitled to withhold it, or annex conditions to the payment. It is unnecessary to go particularly into the correspondence, but on the part of the Lords of the Treasury it amounted to a recognition that they have the money, and have the control over it; but they seek to annex conditions to the payment, which they have no right to do. They are merely parties who have received a sum of

money as trustees for an individual under the provisions of the act of parliament."

Shortly after the issuing of the above writ, the Lords of the Treasury announced to Mr. Smyth their determination to revoke his pension, whereupon he made another application for a mandamus, which was refused by the Court, on the ground that the pension was held during pleasure, and might be revoked at any time, and consequently that Mr. Smith had no vested right to it.¹

Lord Denman said, "I can draw no inference of the vested rights which have been insisted on. The superannuation allowance seems to me to be held on the same terms as the office, namely, during pleasure."

Mr. Justice Patteson also said, "No clause of any act has been cited to show that an allowance of this kind, once granted, is to continue for life. It is held by the same tenure as the office, during pleasure."

In the course of the argument the same learned judge said, "We decided nothing in the former case respecting the title to this pension. We held only that the party was entitled to have a sum, which the Lords of the Treasury had admitted to be in their hands for his use."

By these cases it is settled, that, as to *arrears* of a pension, to meet which money has been actually appropriated, the party has a vested right, which he may enforce in a court of law. But where a pension is granted in general terms, without mentioning assigns, or any term for its continuance, the pensioner has no vested right, and the allowance may be recalled at the option of the grantors whenever they please.

The same principle was followed in *Rex v. The Lords of the Treasury*, in *re Hand*, 4 Adol. & Ellis, 986, and in *Ex parte Ricketts*, 4 Adol. & Ellis, 999.

If then this kind of property, with reference to its future existence, be of so precarious and uncertain a character as scarcely to deserve that name, can it be made the subject of sale or transfer? It is clear that no Court of common law would take notice of such disposition; but it by no means follows that it is therefore wholly inalienable. If so, all *choses in action* would be in the same situation. It is well

¹ 4 Ad. & E. 976.

known, however, that such last-mentioned interests, as well as many others, are assignable in equity, although not so at law. Our next step will be to ascertain whether a pension, merely granted during pleasure, falls amongst this class.

To show that our equity judges have frequently taken cognizance of the transfer of things of an equally uncertain and contingent character, we shall proceed to consider some of the most contingent interests of which assignments have been established in Courts of equity.

In *Hobson v. Trevor*, 2 P. Wms. 191, the facts were shortly these:—Mr. Trevor, the eldest son of Sir John Trevor, formerly Master of the Rolls, had incurred his father's displeasure, and it was probable that he would be wholly disinherited. On the marriage of Mr. Trevor's daughter, he gave a bond for the settlement of one-third of all such real estate as might descend to him from his father. The father died intestate, and it was held that this expectant *possibility* of the heir, in the lifetime of his ancestor, was capable of being made the subject of contract and equitable transfer, and that Mr. Trevor was bound to settle the same accordingly.

In the case of *Beckley v. Newland*, 2 P. Wms. 182, the Court of Chancery established an agreement between two husbands, that all legacies which should be given to either of them by the will of a person, whose presumptive co-heirs they had married, should be divided between them.

In both the above instances it will be seen that the chances were great of the contracting parties ever becoming entitled to the subject with which they dealt; but it was nevertheless decided, that, if ever they did acquire the property, their prospective alienation of it should be carried into effect. These cases were approved and followed in principle by Lord Hardwicke in *Wright v. Wright*, 1 Ves. sen. 409, and they are now invariably acted upon. See *Wethered v. Wethered*, 2 Sim. 183; *Lyde v. Mynn*, 1 M. & K. 683.

So far, indeed, have courts of equity gone in establishing the contracts of parties, whatever might be the description of interest to which they referred, or however contingent, so long as it happened to be within the verge of possibility, that a case can hardly be put in which such relief would be

refused on the mere ground of the uncertainty of acquisition or enjoyment. It has been decided that the future earnings of a ship may be made the subject of assignment in equity, not only prior to any particular voyage being commenced or contemplated, but before the assignor has purchased the vessel. *In re Ship Warre*, 8 Price, 269, note. And there is no reason why a similar doctrine would not prevail, although the ship were unbuilt, or the timber unfelled of which it was to be constructed.

It would be a needless occupation of valuable space to mention the numerous other instances in which future and barely possible interests have been admitted to be the subjects of equitable transfer, for the purpose of showing that the circumstance of a pension being revocable at any time would not affect its assignability. The case of prize-money may however be stated as strongly analogous. There the crown may, at any time before actual payment, recall the award or grant, but it was nevertheless held in *Alexander v. The Duke of Wellington*, 2 R. & Mylne, 35, that the prize money was capable of prospective assignment.

It thus clearly appears, that neither on grounds of public policy, nor in consequence of the uncertainty of pensions, are they incapable of equitable transfer. It must however be remarked, that by the express provisions of some acts of parliament under which pensions are created, their alienation is prevented. Thus Chelsea Hospital pensions,¹ Greenwich Hospital pensions² and excise pensions³ are made inalienable. These positive enactments of restraints on anticipation may be taken as a legislative declaration of their necessity; and that without them the pensions could be made the subjects of ordinary bargain and sale; a doctrine in consonance with the well known principles of our law, which are invariably opposed to depriving any sort of property of its usual incidents, or imposing any fetters upon its unqualified enjoyment or absolute disposition, by mere construction or implication.

There is also another description of pension which is usually

¹ 7 Geo. 4, c. 16, s. 26.

² 10 Geo. 4, c. 26, s. 11.

³ 7 & 8 Geo. 4, c. 53, s. 121.

rendered inalienable, viz. a personal provision granted by the nation as a reward for distinguished public services, and which is intended for the support of titles and dignities at the same time conferred. Thus the Court of Chancery refused to enforce an assignment of the pension granted by the statute 5 Anne, c. 4, to the Duke of Marlborough "for the more honourable support of his dignities. The statutes too by which the honours and estates of the Duke of Wellington were bestowed by a grateful people will be found to contain restrictive clauses.

Although we have now, it is conceived, established the assignability of pensions in a Court of equity, except in cases where the grants of them contain some clear and distinct provision against their alienation, it remains for us to ascertain the way of rendering the transfer of them effectual. A bill may undoubtedly be filed against the pensioner to enforce the assignment; but unless an injunction can be likewise obtained to restrain the payers of the pension from paying it to him, no complete remedy will be in the hands of the assignee. It was decided by the Vice Chancellor in *Ellis v. Earl Grey*, 6 Sim. 214, that an injunction may be granted against the Lords of the Treasury to restrain them from paying the compensation allowance awarded to a side clerk of the Exchequer on the abolition of his office. The allowance had been made the subject of contract or transfer by the grantee, which this bill was filed to enforce. A demurrer was put in by the Lords of the Treasury for want of equity. His honor overruled the demurrer, and in so doing said that their lordships were *mere ministerial conduit pipes* to pay to the parties entitled; that they were not at all in a different situation from the Governor and Company of the Bank of England, who are frequently prevented by the Court from transferring stock or paying dividends to the individuals who appear on their books to be entitled to them. In this case the allowance had been granted *for life*, and not simply during pleasure, and it cannot therefore be treated as an authority, that where a pension or allowance is voluntary and revocable, the Court would enjoin *in futuro* the payment of it to the grantee. No case has yet gone to this extent, and

the Vice Chancellor, in the judgment above referred to, said he was of opinion that this bill did not seek to interfere with any *discretion* which the Lords of the Treasury had to exercise. As to the arrears which have actually accrued at the time of the application to the Court, and are in the hands of the paymaster to the account of the grantee, an injunction would be clearly granted to restrain the payment. Even at law they would be treated as the property of the assignor, like any other *choses in action*. Accordingly in *Tunstall v. Boothby*, (reported in the Legal Observer of the 14th March, 1840,) an injunction was granted to restrain the receiver-general of the customs from paying the *arrears* of a revocable compensation allowance to the assignees of the insolvent grantee, who had previously transferred it to the plaintiff as a security for an annuity. On appeal this injunction was sustained, but both the Lord Chancellor and the Vice Chancellor threw out opinions that an injunction could not be issued as to the *accruing* payments.

The better opinion is, that an injunction to prevent the payment of a *revocable* pension or allowance can only be obtained as to the arrears, and not as to the future sums; because it would tend to interfere with the discretionary power of recall. But, as against the grantee of the pension, the rights of his assignee under the assignment are, in a Court of equity, clearly sustainable. All the powers of the Court applicable to such purpose would be available to enforce them, either by way of restraining immediately the receipt by the grantee of the prospective instalments, or preventing from time to time, on successive applications, the payment of the accrued arrears.

ART. X.—SUSAN HOPLEY : OR CIRCUMSTANTIAL EVIDENCE.

Adventures of Susan Hopley ; or, Circumstantial Evidence.

Three Volumes. London : Saunders and Otley. 1841.

THE second title of this book brings it fairly within our jurisdiction, and we gladly avail ourselves of every legitimate occasion for enlivening our pages with matters of the lighter sort. The writer's method is to bring a great many worthy people into trouble for crimes of which they are innocent, by a series of unlucky coincidences, and afterwards fix the guilt on the true criminals, by a succession of lucky discoveries. We are not aware what precise object he has in view, or what moral we are expected to deduce from his narratives, but the coincidences which are assumed to be convincing, are mostly such as neither justice, judge, or jury would be satisfied with, and the discoveries are too providential to be calculated on amongst the ordinary occurrences of life. Unsophisticated readers consequently must rise from the perusal with a multitude of false impressions upon their minds, particularly regarding the administration of criminal justice ; and as some of these may have to act upon their impressions, it may be as well to correct the most mischievous of the mistakes.

Susan Hopley is a maid-servant, who lives with five or six families in succession. The narrative is composed of the adventures that befall the leading members, and an attempt is made in the last volume to bring the whole of them to a point. The commencement is unexceptionable,—the style clear and quiet, the characters well drawn, the incidents well chosen, the accompanying observations judicious, and the occasional touches of humour in good taste. But before Susan has got into her third service, it becomes obvious that the author is a tyro in the art, for none but a tyro (not to say a bungler) would lay a foundation broad enough for a novel in twenty volumes, and undertake to work out the catastrophe in three. In a word, his incidents are crowded one upon the other in the most thoughtless profusion, and so many of his threads are either dropped, knotted, or inextricably intertangled from their multiplicity, that he strikes us much in the same light as if, after two or three lessons in the simple game of cup and ball, he had undertaken to imitate the celebrated Indian juggler, who kept up nine balls at once with the most graceful facility.

Susan is the daughter of a day labourer in the village of Mapleton, in the south-eastern part of England. She has one brother, Andrew, three years younger than herself. She is taken when very young into the service of a Mrs. Leeson, whose story is prettily told in the first chapter. Her husband, an officer in the army, is lost in the homeward passage from the West Indies, and she dies of a broken heart, leaving one child, Harry, who is immediately adopted by Mr. Wentworth, Mrs. Leeson's uncle, who also takes Susan into his service. Mr. Wentworth is a wine merchant of large fortune. The business is conducted by a confidential clerk, Simpson, and he himself resides almost exclusively at his country house, Oakfield. He has an only daughter, Fanny, whose only failing is an attachment to Walter Gaveston, a distant relative, and partner in the wine trade.

"It was pretty evident to every body but herself, that Mr. Gaveston was not the husband her father would have selected for her; but he was too indulgent and too just to oppose her wishes on a subject so material to her happiness, unless he could have given her convincing reasons for his objection; and this he could not. He had originally been very fond of Walter, who was a clever, handsome, forward boy; but of late years he had felt a sort of growing dislike to him that he could hardly account for; and that he was himself half inclined to look upon as idle antipathy or weak prejudice. He had nothing exactly to allege against him; and sometimes after examining his own mind, and searching for the motive of his own alienation, he would end by saying, 'D—n the fellow!' I believe it is only that I don't like the expression of his face." Nobody did like the expression of his face, that looked at it with unprepossessed eyes—but poor Fanny's were witched—and if she ever remarked that the prospect of her marriage was disagreeable to her father, she attributed the dissatisfaction wholly to his dread of parting with her, and not at all to the nature of the alliance she was about to form.

"In spite of the displeasing expression we have alluded to, there could be no doubt that Mr. Gaveston was a very fine looking man, and one likely to attract the eye and admiration of the fair sex in general. His features were regular and manly; he had a beautiful set of teeth, dark hair and eyes, a complexion bronzed into a very becoming hue by the sun of the South, and a figure that formed a perfect model of strength and agility. And, accordingly, there were few men who excelled so much in all manly exercises; whether he walked, rode, or danced, the performance was perfect;

he was the best cricket player about the country, the most fearless huntsman, and the best shot. He was equally remarkable for his proficiency in all games of skill—cards, billiards, nothing came amiss to him. Then he was an excellent judge of a horse, very fond of attending races, and understood all the intricacies of betting, edging, and jockeyship in general. Of classical learning or deep reading he had very little; but he had a great deal of general information; knew something of most people that were making any sensation in the world; and was seldom at a loss upon any subject of fashionable or popular discussion.

“Such was the man that had won Fanny Wentworth’s affections, and to whom she was to be united in the ensuing month of August. Many preliminaries of course were to be arranged. Dresses to be prepared, settlements drawn up, and entertainments given; and when Harry returned to Oakfield for the vacation, he found the house full of gaiety and commotion.

“‘I think it right to inform you,’ said Mr. Wentworth one day to Mr. Gaveston, when the subject of settlement was under discussion, ‘that since the death of Harry Leeson’s parents, I have adopted him, and look upon him as my son. I was always fond of the boy, who is as fine a little fellow as ever lived; and I loved his father and mother, and would do it for their sakes if I did not do it for his own. The arrangement I propose to make, is this—and I have given Oliphant directions to prepare the settlements and my will at the same time. You are at present possessor of a sixth share of the business—I will make that a fourth. Whatever fortune I give my daughter now, or whatever I leave her, I shall vest in trustees for her use, to descend from her to her children, or if she have none, to be disposed of as she pleases; with the exception of ten thousand pounds, of which you will have the life rent, should you survive her. This, with a fourth share of the business, will I hope be considered sufficient. Are you satisfied with that arrangement.

“‘Quite, Sir, quite,’ replied Mr. Gaveston; and he endeavoured to look very satisfied indeed.

“‘With respect to Harry Leeson,’ continued Mr. Wentworth, ‘he will be entitled by my will to two shares of the wine business, and to ten thousand pounds, to be paid free of all deductions. The fourth share I intend giving to old Simpson, on whom the management of the whole must rest. I shall also appoint him guardian and trustee for Harry. All this I do with Fanny’s entire approbation.’

“How far these arrangements were agreeable to Mr. Gaveston

may be doubted ; but at all events, he reiterated the assurances of his entire satisfaction ; and Mr. Wentworth did not trouble himself to investigate further."—vol. i. p. 21—25.

Mr. Gaveston, it may be as well to say at once, is the villain of the tale, The aphorism,

"Virtuous and vicious every man must be,
None in the extreme, but all in a degree."

is set at nought in his favour. There is no softening shade about him, and so soon as Mr. Wentworth's intentions are made known, he does his best to bring about the death of little Harry. He first puts the boy on a runaway hunter to the imminent peril of his neck, and then tips him out of a boat into a pond before he has learnt to swim. The last of these attempts is made so clumsily, and excites so much suspicion, that we hardly understand how it failed to reach the ears of Mr. Wentworth. Harry is saved by Andrew Hopley, who, it must be borne in mind, is now a livery servant in the family, and in love with Mabel the milk-maid, a haughty village beauty, who just endures the attentions of her humble suitor. The marriage between Fanny and Gaveston is postponed once or twice by the contrivance of the intended bridegroom, but at length the time is fixed. Mr. Wentworth and Fanny, who had been absent on a short tour of pleasure, are expected home on the 16th of the month, when a letter arrives, written by Andrew at his master's desire, to say that they had changed their plan, to accommodate Gaveston ; that they had now arranged to sleep at Maningtree on the 17th and reach home on the 18th. On the evening of the 16th a suspicious looking person, with a very remarkable nose, called to inquire when the family were expected. They do not arrive, and on the night of the 18th Susan is prepared for something dreadful by a dream. She dreams, whilst sitting in her master's bedroom by the fire, that she sees two men come out of the closet, one of whom is standing behind her with an open clasp-knife in his hand, when her brother, with a large gash in his throat, suddenly comes between and whispers, "No, no ; let her sleep ! let her sleep !"

The next morning, Mabel, the handsome dairy maid, is missing, but nothing transpires till nearly three o'clock in the afternoon, when a police officer arrives from Maningtree, and it turns out that Mr. Wentworth had been murdered.

"The particulars elicited on the inquest were briefly as follows. It appeared that on the evening of the 17th, about eight o'clock, Mr. Gaveston had arrived at the King's Head inn, on horseback, and inquired what beds there were for a family that was following. He was informed that, being ball night, there were none in the inn, but that the party could be well accommodated over the way, in a house that being unoccupied the host had the use of during the full season. He inspected the rooms and approved of them; but expressed a wish, that as the weather was bad, the young lady might be provided with a bed in the inn if one became vacant. He then went away, and no more was seen of him till towards nine o'clock, when the family arrived, and he met the carriage at the door. In the meantime, a person had called to say that 'the bed, engaged some days before for a Mr. Smith who purposed to attend the ball, would not be wanted;' and Mr. Gaveston immediately secured this apartment for Miss Wentworth.

"It next appeared that Mr. Wentworth had inquired for his servant several times in the course of the evening, but that Andrew was not to be found; but on interrogating the waiter, he admitted that the house was so full of servants belonging to the gentry attending the ball, and he was himself so busy, that he had taken little pains to seek him. At length, on Mr. Wentworth's becoming impatient, he had discovered him standing amongst others at the ballroom door, where he declared he had been the whole time.

"About eleven o'clock the family had retired to bed, and nothing more was heard of them till the following morning, when Mr. Gaveston came over to the inn in a state of considerable agitation, and said he had been robbed of his pocket book and watch. On hearing this, the chambermaid, waiter, and boots, had accompanied him across the way, where they searched every part of his room without discovering the missing articles. Mr. Gaveston then inquired where that fellow Andrew was; and they had proceeded to the servants' apartment, but he was not there; and, on investigation, no one appeared to have seen anything of him since the night before.

"Mr. Gaveston then proposed their visiting Mr. Wentworth, to learn if he had been robbed too; and after knocking and receiving no answer, they opened the door and discovered the unfortunate gentleman lying on the floor with a stream of blood issuing from a wound in his throat, and a severe contusion of the head, which it was the opinion of the surgeon had been occasioned by a blow that had rendered him insensible before the wound in the throat was inflicted. From the appearance of his bed it was supposed he had quitted it in haste on being alarmed. His watch was gone;

and his portfolio, which lay on the dressing table, was found open and rifled.

When Andrew's room came to be examined, there were also evident indications of his having left his bed precipitately. The clothes were dragged nearly off, and, as well as the pillow, were lying on the floor. A chair that stood by the bedside was overturned; and under it were found a leathern purse containing a few shillings, and a silver watch, which Susan recognised as belonging to her brother. No clothes were found in the room but one stocking, which lay near the window, and appeared to have been dropped. The window was open, and as the room was on the ground floor, there was every reason to conclude he had escaped that way. At the door of his bedroom were found his boots, which the man, whose office it was to clean them, said he had taken away the night before, and placed there himself in the morning.

"But the strongest circumstance against Andrew was a letter found on the table in his room, addressed to A. B. Post-office, Maningtree, and which ran as follows:

" 'All's right—house full—no bed to be had but *Mr. Smith's*—sky as black as hell. I must cut till after dark. At eight o'clock I'll be hanging about the Checquers—word, How far to London?'

"The letter was written in a good clerk-like hand, and well spelt.

"This circumstance led to inquiries of the waiter as to who had engaged and given up *Mr. Smith's* bed; but he could give no information on the subject. He believed it to be the same person that had called on each occasion; and as he wore a drab coat, he had supposed him a servant; but both visits were after dark; he had only left the notes at the door, and he could not say he should know him again.

"However, he was able to produce a second note; and on comparing it with the letter found in Andrew's room, the writing appeared to be the same.

"The woman who kept the post-office was then interrogated, and admitted that she remembered on the evening in question, that a man had knocked at the window, and inquired if she had a letter for A. B. She knew it was a man by his voice, but had not seen him; because she had only opened a single panel in the window, and he had stood rather on one side. There was no post mark on the letter, and it must have been dropped in on the spot. The man said, 'How much?' she answered, 'A penny,' which he handed to her, and departed.

"When all this evidence had been educed, Mr. Gaveston, and Mr. and Mrs. Jeremy were called to speak to Andrew's character. The two latter avowed the most favourable opinion of him ; but Mr. Gaveston said, he knew too little of the young man to have formed any ; but he did not omit to mention Mabel's disappearance, and his conviction that the persons he had traced on the road were Andrew and her.

"This circumstance, together with the letter found in the young man's room, and the mysterious passage in the one he had written to his sister, combined with his evasion, seemed to point him out so decidedly as the criminal, that even Susan herself could not be surprised at the verdict which was brought in of 'wilful murder against Andrew Hopley ;' more especially as the messenger that had been sent to Oakfield returned without any tidings of the dairymaid."—vol. i. pp. 63—68.

We cannot say what Susan may have been, but we ourselves should have been very much surprised at such a verdict. There is not a tittle of evidence against Andrew but the fact of his disappearance, and the state of his room rather leads to the conclusion that it was involuntary. Why should he leave his watch, purse, boots, and a single stocking ? or, if he were astute enough to place them as a blind, how came he to forget the letter ? Why, again, should he or his accomplices be so anxious to keep a single bedroom vacant at the inn ? It was not at all likely that Gaveston would occupy it, or suffer his intended to sleep in a lone house without a guard. Then, surely every nook about the premises would have been ransacked, and an active officer would have found little difficulty in tracking Mabel, sufficiently at all events to ascertain whether Andrew was the partner of her flight.

From a conversation between some old crones at a well, (too palpably suggested by a scene in the *Bride of Lammermoor*), Susan collects, that the house in which the murder had been committed belonged to a young scapegrace of good family whose nose resembles that of the individual who called at Oakfield on the 16th, and chance supplies her with two or three important pieces of information :

"It was a large square brick building, and it had a heavy, antiquated, formal look, that suited well with the name it bore, which was the *Old Manor House*. The place was encircled by a lowish wall, and

there was a paved walk which led from the gate to the door ; and Susan perceived that one of her objects in desiring to inspect the place would have been defeated. She had a notion that she might make some discovery by examining the ground under the window of Andrew's room ; but the pavement extended to a considerable width all round the house, so that no footmarks could remain. Beyond this there appeared a largish wilderness of a garden and orchard, neglected and overgrown with weeds, shrubs and fruit trees past bearing.

“ ‘It's a dismal looking place,’ said Susan to the chambermaid who happened to come into the room, ‘but I should like to have gone over it, if they would have let me.’

“ ‘You'd have seen nothing,’ replied Betty, ‘to throw any light on it. There wasn't a corner we didn't look into ; but except the young man's watch and purse and stocking, there wasn't a thing left behind.’

“ ‘And his boots,’ observed Susan.

“ ‘That's true,’ answered Betty ; ‘and unless he'd a pair of shoes in his pocket, he must have gone away barefoot ; for he didn't take a single article over with him when he went to bed, that I saw ; and I lighted him to his room myself. The only thing I found at all,’ continued the chambermaid, ‘was an old shirt button, such as gentlemen fasten their wristbands with—it was on the pavement under the window of the footman's room ; but it may have been lying there weeks before for any thing I know. Here it is,’ and she drew it from her pocket—‘if you like to have it, you're very welcome.’

“ ‘I should,’ said Susan, as she examined it. It was a pair of little studs united by a chain, with a bit of coloured glass in each ; on one was inscribed W. G. and on the other J. C. The first were the initials of Mr. Gaveston ; and though even if the thing were his, the discovery amounted to little or nothing, yet Susan felt anxious to possess it, and accepted Betty's offer with thanks.”—vol. i. pp. 81—83.

No will is found, though the old butler is ready to make oath that his master left one in the escrutoir in his dressing-room, and took another (a duplicate) with him. At hearing this, Susan thinks of her dream, but no clue to the discovery of either document presents itself.

“ ‘But after all, it won't signify much, will it?’ said Susan. ‘The whole fortune will go to Miss Wentworth ; and I'm sure she'll take care of Master Harry.’

“ ‘Miss Wentworth won't be of age these two years,’ replied Jeremy, ‘and if she marries that Jackanapes before she's her own missus—whew !’ ”

An affecting interview between Susan and Harry Leeson is described, in the course of which he gives her a half-crown which he had just received from Gaveston, and she immediately recognises a coin on which Mr. Wentworth set a peculiar value from circumstances of early association. All she can venture to do, however, is to lay it by with the shirt-buttons ; and, rendered miserable by the consciousness that she is regarded by all around her as the sister of a murderer, she soon afterwards repairs to London in search of a place. She is put down in the middle of one of the great thoroughfares ; a fellow who offers to take care of her luggage runs off with it, and at midnight we find her without a sixpence, inquiring her way to her only friend, Dobbs.

It is related in Boswell's Johnson, that the two friends, in one of their evening strolls through Fleet Street, found a poor Scotch girl in the act of knocking at all the doors in succession in the hope of finding her cousin Jeannie, of whom all she knew was, that she went up to London some time since and was still living there. Half from love of frolic and half from sympathy, they proceeded to knock for her, and on coming to about the tenth house the door was answered by the identical Jeannie. Poor Susan had no such luck, and was in a fair way of passing the night in the streets, when she finds compassion in a quarter where the straightlaced portion of her sex would least think of looking for it :

“ She was attired in a silk dress, red shawl, and straw bonnet ; and by the light from the lamp which fell upon her face as she advanced, Susan discerned that she was young and pretty. Her voice too was gentle ; and, emboldened by that and the countenance, the poor wanderer determined on making a last attempt to obtain the information she needed. Rising, therefore, to let her pass, she dropped a curtsey, and said, ‘Would you have the goodness, Ma'am, to tell me the way to Westminster ? I am a poor stranger from the country, and am quite lost.’ ”

“ At first she was about to pass on without heeding the question, but at the last words she paused and looked back. ‘To Westminster !’ said she, ‘you're a long way from Westminster. What part of it do you want to go to ?’ ”

“ ‘To Parliament Street, Ma'am,’ replied Susan.

“ ‘And don't you know your way about London at all?’ said she.

“ ‘Not a bit, Ma'am,’ answered Susan. ‘I never was in it till about two hours ago, when I got off the coach that brought me from the country; and since that,’ she added, giving way to her tears, ‘a man that offered to carry my luggage has run away with my boxes, which contained all I had in the world; and here I am, without money, or a lodging for the night, and but one friend in the whole place, and I can't find my way to where she lives.’

“ ‘It's impossible you should without some one to guide you, and it's not my road,’ answered the lady. She hesitated a moment, and then drawing nearer to Susan, she looked hard in her face under her bonnet, as if to see whether she were speaking the truth. The result of the investigation appeared to be satisfactory; for she added, as if moved by a sudden impulse of compassion—‘Come with me! I'll give you shelter for a few hours, and in the morning you can find your friend. *There was a night in my life when if some charitable soul had done as much for me, I might'nt be the miserable wretch I am now.* Come along!’ And with that she turned and walked rapidly up the street, Susan keeping close by her side.

“As she was young, pretty, well dressed, and according to Susan's notions appeared to be a gentlewoman, the poor girl was so surprised at her last words, that she forgot everything else in wondering what they could mean; and as the lady herself seemed to be in a reverie, they proceeded for some time in silence, which she at length rather abruptly interrupted by saying, ‘What's your name, and where did you come from?’

“ ‘My name's Susan Hopley, ma'am; and I come from Mapleton,’ answered our heroine—‘And as I spoke the words,’ she used to say, ‘I fell rather behind her; for I expected nothing else but that she would have driven me away from her directly and left me to pass the night in the street. But, to my great relief, the name didn't seem to strike her at all; and I felt much comforted to see that the people in London were not so much occupied about Andrew and me, and what had happened in the country, as I had supposed.’”

There are masterly touches in this scene, and the charitable will draw a just conclusion from it—that all female virtues do not hinge on chastity, and that the feelings which do most honour to our nature are often to be found amongst the frail. Julia, the female Samaritan, is living with

one of Mr. Wentworth's murderers, but this does not transpire till long afterwards. She gives Susan a night's lodging, shows her the way to Dobbs', and then drops out of view for a season.

At this point the story crosses the Channel to follow the fortunes of Mabel, the handsome milkmaid, who had been persuaded by Gaveston to quit England on the night of the murder, in the hope of becoming the wife of a marquis in France. The dialogue between her and her companion, an acquaintance of Gaveston's, on arriving at Paris, will best explain her situation :

" ' I should like to go to the Thuilleries, by all means,' returned the lady ; ' but I don't intend to give up being a marchioness.'

" ' Certainly not, unless you gave it up for something better,' replied the gentleman. ' But there are more marquises in the world than Don Querubin who have an eye for beauty ; young, handsome, and rich ones into the bargain ; not to mention counts, dukes, and princes, all as plenty as blackberries here. At all events you can give it a trial. A little delay can do no harm ; and we can go forward if we find things here don't answer our expectations. To-morrow, if you like, we'll move into a more fashionable quarter ; and by the by, we must think of how we'll call ourselves. We're in the passport as Mr. and Miss Jones—Colonel Jones would sound better, and be more likely to get us on.'

" ' Why not Lord Jones ?' said the lady.

" ' I'm afraid that won't do,' returned he. ' Lords are too well known. But there are fifty Colonel Jones's, and I may be one of them for any thing the people here will know to the contrary.'

" ' I don't like the name of Jones, at all,' replied the lady. ' I like names of three syllables, at least ; and I like two or three names. There were some people in our county that had two or three names, and they were always thought more of than others on that account.'

" ' But we'd better stick to Jones,' returned the gentleman, ' for fear of accidents, as it's in the passport.'

" ' But we can add some more names to it,' said the lady. ' In our county there were the families of the Arlingtons, and the Darlington. I think Arlington Darlington Jones would sound very well.'

" ' It's coming it rather strong,' said the gentleman.

" ' I like it,' said she.

" ' Then, Arlington Darlington Jones, let it be. We'll get some cards to-morrow, the first thing we do.'

"On the following morning after breakfast, Colonel and Miss Arlington Darlington Jones sallied forth in quest of fashionable lodgings, and at the Hotel Marbœuf, in the Rue St. Honoré, they found a suite of apartments likely to answer their purpose. On the first floor, large, lofty, and elegantly furnished, they appeared to the fair Englishwoman every thing that was desirable."

She attracts the notice of the leading French roués, and we leave her in a fair way to become the prize of the Duc de Rochecouart, intended, we presume, for a portrait of the celebrated Duc de Richelieu, the most skilful and reckless seducer of his day.

The French part is tolerably well done, but we cannot understand the fancy of putting half the dialogue in one language and half in another. For example :

"C'est vrai," said D'Armagnac. "We'd a fair start—il y avoit champ libre pour tous."

We return to Susan, who finds her friend Dobbs, and through his recommendation is received into the service of a clerk in the post-office. Mr. and Mrs. Wetherall, her new master and mistress, have just come to the sage resolution of living as pleasant a life as possible; and to add at once to their income and merriment, they agree to take a boarder, a gentleman named Lyon, who performed in the orchestra of one of the minor theatres :

"As Mr. Wetherall had foreseen, Mr. Lyon proved an extraordinary acquisition. He was not only a capital fellow himself, but he knew a number of other capital fellows who were all as willing to be introduced to Mr. Wetherall as he was to them, and who unanimously agreed that Mr. Wetherall himself was also a capital fellow. The consequence was, that there were dinner parties on a Sunday, and supper parties four or five times in a week, at which the only contention that arose was, who should be the merriest, and say or do the funniest things. The visitors were mostly actors of an inferior grade, who if they could make nobody laugh when they were on the stage, could keep Mr. Wetherall's table in a roar; and who if they could not act themselves, had a particular talent for imitating those who could. The host was little behind them—he could bray like an ass, and crow like a cock, and do a great many other humorous things; and as from the retirement in which he had lived, these talents had hitherto been much in abeyance, he was the more sensible to the honour and glory of exhibiting them now

to actual professors in the art of being funny ; more especially as the applause they drew were certain, loud, and long. It is so easy to please a set of capital fellows at your own table, when they have no other table to go to.

“ But, unfortunately, these delights, like most others, have their sting. It is impossible to entertain a set of capital fellows four or five days in a week without cost ; and, however unaristocratic the nature of the potations, it is equally impossible to consume a great deal of liquor without liquidating a great deal of cash. After these things had been going their train for some months, the butcher and the baker began to be extremely importunate ; and Mr. and Mrs. Wetherall took a particular dislike to single knocks at the door, and hated the sight of little bits of dirtyish-white paper that Susan was ever and anon forced to present to their notice.”

The result is, that one morning Susan finds part of a letter in the grate, which turns out to have originally contained a ten pound note intended for herself, when it was stopped on its way by Mr. Wetherall. He finds himself on the brink of destruction, and, unable to endure the apprehension of disgrace, hurries off to Blackfriars Bridge, with the full intention of plunging from it. About the same time an interview has taken place between Gaveston and Simpson, the confidential clerk of the establishment, who, under a threat of breaking off the marriage by exposing certain improper dealings of Gaveston's, extorts a promise of half of the concern, to be formally made over without delay. His road to his solicitor's is over Blackfriars Bridge ; accident has brought Gaveston the same way, and on seeing Simpson approach, the opportunity for ridding himself of such an obstacle is too tempting to resist. “ One good blow, and a heave over the parapet, and I'm at once revenged and safe.”

“ ‘ Here he comes ! ’ thought Mr. Gaveston, who, concealed in a recess with his bludgeon poised, awaited his victim. On came Mr. Simpson—but just as he arrived at the spot where his enemy was lurking to take his life, the faint outline of a figure mounted on the parapet caught his eye—‘ Gracious Heavens ! It's that wretched creature going to drown herself,’ exclaimed he—and with a loud cry to arrest her desperate purpose he darted across the road, whilst the weapon raised for his destruction, descended through the unresisting air.”

The woman turns out to be the same who had sheltered

Susan ; and her purpose is in point of fact arrested by Mr. Wetherall, who had suspended his own intentions for the purpose. "Merciful Heavens!" exclaimed Mr. Simpson; "then my opportune midnight walk has been the means of saving three lives. Little did he or Mr. Wetherall imagine that Mr. Simpson's effort to save the life of another, had been the means, under Heaven, of saving his own."

One would think that the author had now got quite enough upon his hands, as regards both stories and characters, but he is a perfect glutton in this line, and two or three fresh sets are yet to come.

Julia, the rescued frail one, not content with detailing her own history, must needs give that of her progenitors; and a passage in the life of her father comes too immediately within our own immediate object to be passed over.

Valentine (her father) is clerk to a notary at Nantes, named Le Moine, whose daughter, Julie, falls in love with him. He is attached to another, and Julie discovers by an accident that her rival is about to grant him an interview :

"When the usual hour for closing the office approached, she dressed herself in a black gown, shawl, and bonnet; and seating herself in an apartment, that, with the door ajar, gave her an opportunity of seeing whoever went in or out of the house, she awaited Valentine's movements. But the usual hour arrived, and passed, and Valentine still wrote on. The clock struck again and again, till at length she counted twelve. 'He can't mean to go,' thought she, 'or has he any suspicion I am watching him?'" and she arose softly and extinguished her light, that when Valentine opened the door he might have no reason to imagine her up so much after her customary hour for retiring. It was some time past one, and Julie was beginning to think that she might as well go to bed, in reality, as it must be too late for any rendezvous that night; when she heard the door bell ring violently, and saw Valentine, a moment afterwards, on the summons being repeated, pass through the passage to answer it. Who the stranger was she could not see, nor could she distinctly hear what was said—but the voice was a man's, and she fancied she distinguished the words, 'Come, come quickly!' At all events, they were but few, whatever they might be—the interview was momentary—Valentine returned hastily into the office, snatched up his hat and cloak, and accompanied the stranger from the house.

" 'She has sent for him!' exclaimed Julie, and furious with jealousy, she rushed out after them. The feeble light of the street lamps only just enabled her to discern two figures moving rapidly away, and she ran lightly on, till she was sufficiently near to be in no danger of losing sight of them, trusting to her black dress and soft step to protect her from observation. One walked rather in advance of the other, and as they were both about the same height, and both wore dark cloaks, she could not distinguish which was Valentine and which the stranger—but she fancied Valentine was the last.

" On they went—so fast that it was not without considerable difficulty Julie succeeded in maintaining her distance—through street after street they hurried, till they reached the outskirts of the town, and there they stopped at a small villa, the door of which being ajar, they entered and disappeared.

" 'Here then she lives,' thought Julie, as she drew near to survey the premises—'the rest I shall easily discover—whether she be maid or wife; and she shall pay a heavier price for her pleasure than she dreams of! But now I must return, for Valentine will doubtless stay till morning, and I can't remain here all night;' and the excitement being somewhat abated, she began to contemplate with terror her lonely situation, the hour, and the distance she had to retrace.

" Just, however, as she was turning away, she was startled by the sound of a foot, and on looking round, she perceived one of the figures that had entered, come out again, close the door, and move rapidly back towards the town; but whether it was Valentine, or the other, she could not discern.

" 'At all events, I'll keep near him,' thought she. 'It will be a protection whichever it is—besides, if it is Valentine, I may be returning with half my errand if I don't trace him further.' Whoever it was, he walked back even faster than he had come, and she was frequently obliged to run to keep him in view. He returned by the same way till he reached the heart of the town—he then turned down a narrow street—stopped at the door of a *cabaret*, where there was still a light glimmering through the windows, knocked with his knuckles against the door, which being presently opened, he entered, and she saw him no more. Whilst he was waiting to be admitted the town clocks struck three, and the commencement of a heavy shower of rain warned Julie to hasten away. 'That is not Valentine,' said she to herself—'he has remained at the villa with his lady—this was but the messenger that was sent to fetch him,' and she returned to her home, where Madeleine the maid-servant,

whose services she secured by a few franks opportunely administered, let her in. She went to bed, possessed with rage and jealousy ; and passed the sleepless hours till morning, meditating plans of vengeance to be wreaked on her happy rival."—vol. i. pp. 272—276.

The next morning she revisits the villa, and sees Valentine making his escape over the wall, but he is too far off to be addressed, and she has no alternative but to return home and wait for him :

" When she reached home, he had not yet arrived ; but secure that she should see him ere long, she desired Madeleine to bring her a cup of coffee, and sat down at the window to watch his approach, and meditate her plans of vengeance. But hour after hour passed, and no Valentine appeared ; and to account for his absence, I must now relate his part in the adventures of the night.

" Anxious to finish the work he had in hand, he had sat up far beyond his usual hour, and was still diligently plying his pen through the concluding lines of the document he was preparing, when he was roused by the loud and hasty summons of the bell, which has already been alluded to. At first, imagining from the lateness of the hour, that it was either a mistake, or a piece of mischief of some wanderer of the night, he did not move ; but a second peal, louder than the first, succeeding, he hastened to the door to inquire the cause of so unusual a disturbance.

" ' Is this the house of Monsieur Le Moine ? ' eagerly asked a man who stood there, muffled in a blue mantle and a slouched hat.

" ' It is,' replied Valentine.

" ' Then come quickly,' cried the man, seizing his arm as he spoke—' the patient is dying of a wound—there is no time to lose—bring with you what is needful ; and in the name of God, make haste ! '

" ' I'll only fetch my hat and cloak,' said Valentine, who concluded that the service required was to draw up some testamentary document of importance, and that, as Monsieur Le Moine was absent he must supply his place as well as he could. Equipping himself, therefore, in haste, and thrusting a sheet of parchment in his pocket, without stopping to ask more questions, he set off after the stranger, who at a rapid pace conducted him to the house to which Julie had followed them, pushed open the door, and without even waiting to shut it, ascended the stairs by the light of a small lantern which he drew from under his cloak—unlocked a chamber door, made a sign to Valentine to enter, which he had no sooner done,

than he instantly closed it upon him, saying, ' You'll see what's necessary ; ' and turning the key, was heard descending the stairs as fast as he had mounted them.

" Alarmed by so strange an adventure, and fearing he had been lured into a snare by a villain for some desperate purpose, he used every effort to open the door ; but in vain. He then rushed to the window, threw it open, and called as loudly as he could for aid, but no sound answered his appeal.

" Whilst he was still looking out of the window, endeavouring to discover by the imperfect light how he was situated and whether there was any chance of escape that way, by letting himself down to the ground, he fancied he heard a slight movement in the room behind him, and turning suddenly round to investigate the cause, he, to his horror, beheld, by the light of a night lamp that stood on the table, a ghastly figure of a man in a bloody shirt and night-cap, peeping out between the curtains of the bed, who, the moment Valentine's eye met his, let go the curtain and disappeared.

" Transfixed with fear and horror, the young man at first stood motionless, staring on the curtains, from between which he expected again to see the fearful apparition emerge ; but all remaining quiet, he presently ventured to cast his eyes round the room to ascertain if there were any one else in it besides himself and the figure he had seen ; but perceiving no one, he next summoned courage to advance towards the table, take up the lamp, and approach the bed.

" Valentine was young, and his situation was so extraordinary, that he may be excused for hesitating some time before he ventured to withdraw the curtain ; when, however, at length, he did so, there lay the person he had seen, to all appearance, dead ; at least, he would not have doubted his being so, had he not given signs of life so lately. His eyes were closed, his mouth open, his face of a ghastly hue, and both the sheets and his own person smeared with blood.

" ' In the name of God, Sir,' exclaimed Valentine, ' what is the meaning of this, and for what purpose am I brought hither ? ' but the man not only made no answer, but he showed no symptoms of hearing that, or any other question Valentine put to him ; and after contemplating the body for some time, he came to the conclusion, that the exertion the person, whoever he might be, had made, in rising to look through the curtains, had been a last effort of nature, and that he was now really gone.

" But now again recurred the question, for what purpose had he been brought there to be shut up in a room with this dying stranger ? Where were the friends, where the attendants, that

should have surrounded the bed? The bed, too, of ease and affluence; for there was nothing that indicated poverty or destitution. On the contrary, the house appeared a good one, and was situated in a respectable quarter; and the furniture of the apartment he was in, was not only handsome, but abundant. Had the occupant of the bed been murdered? But, no; it did not seem probable that, in that case, a notary of all persons should have been sent for; unless by the friends of the victim; and none such appeared; so that he rather concluded the stains about the linen proceeded from the patient's having been lately bled.

"Again he examined the room, the window, and the door; but without finding any means of escape. He remembered he had a clasp-knife in his pocket, and thought by its assistance he might possibly pick the lock; but it broke in the attempt, so having tried all he could without success, he saw nothing left but patience, and resolved to compose his mind as well as he could, and sit down quietly to await the events of the morning.

"In spite of his unpleasant situation, he had not sat long before he fell into a doze, from which he was aroused by what appeared to him some movement of the person in the bed. Hastily he started up, and seizing the lamp, drew aside the curtain—but all was still as before. Again he spoke—but no sign of life was given; so concluding it had been fancy, he once more composed himself in an easy chair, where fatigue soon overcoming him he fell into a sound sleep, from which he did not awaken till he was aroused some hours afterwards by a knocking at the room door.

"'Come in,' cried Valentine suddenly awakening, and at first unconscious where he was; upon which injunction the handle was turned and efforts made to open the door.

"'The door's locked, Sir, and the key's inside,' replied a female voice.

"'Locked!' cried Valentine, rousing himself, looking about, and beginning to recall the events of the night—'My God! I remember now—so it is. For Heaven's sake get the door opened, and let me out!' He then heard the woman move away, and presently return with another; and by their conversation he made out that they were searching for the key, wondering what had become of it, and how the door should have been locked. After an interval they both assured him that the key must be inside, as they had sought for it in vain.

"'My good woman,' exclaimed Valentine, 'I tell you I am locked in. I was brought here in the middle of the night, for what purpose I can't guess, and shut into this room. I heard the man

that lured me hither, turn the key ; and all I beg of you is, to send for some one to break the door open, and let me out.'

"After this, he heard the women whispering and tittering together ; and then they went away, and all was silent.

"Having waited some time in expectation of their return, he looked about for a bell, he found one which he reached by mounting on a table, for the cord was cut short ; but he rang it in vain. He then made a noise at the door, and tried to kick it open, but no sound indicated that there was any one in the house but himself. Desperate at the delay, and uncertain whether the women would return or not, he next rushed to the window, and threw it open, resolving to jump out at all risks, rather than longer submit to this mysterious imprisonment."—vol. i. p. 278—286.

He takes the leap, clears the inclosure, and has got to some distance, when he sprains his ankle and is unable to proceed. In this situation he remains for about half-an-hour, when three men come up, lay hold of him, and drag him back to the room in which he had passed the night.

"The occupant of the bed was still there ; but though looking as ghastly as ever, he was not dead. He was sitting up supported by pillows, and on one side stood a gentleman, whom Valentine recognised as an eminent surgeon of the city ; and on the other a priest. At a small table, near the window, sat a grave elderly man in the costume of a *juge de paix* ; and beside him, one younger, apparently his clerk, before whom were materials for writing. Two women, and the men who had pursued and brought him back from the fields, were also present.

"The chair in which Valentine had been conveyed up stairs was set down at the foot of the bed, amidst a general silence that bespoke the awe and wonder of the assistants. Every eye was turned towards him, and amongst them the glazed and lustreless orb of the apparently dying man. As he gazed on the features of the amazed and agitated youth, a faint and transitory flush passed over the blood-forsaken cheek, and for a moment the dead eye shone with an unnatural light ; slowly and with difficulty he raised his feeble arm, and pointing his fore-finger to Valentine he exclaimed, 'That is the man !'

" 'Bring him forward !' said the *juge de paix* ; and they lifted the chair and placed it nearer to the table. 'Now, Sir,' continued he to the sick man, 'are you prepared to swear that that man is your assassin ?'

" 'I am,' replied the other.

" 'Good heavens! Sir,'—eagerly interrupted Valentine.

" 'Silence!' ejaculated the juge de paix, 'and wait till you are interrogated. Write down, Bontems,' addressing the clerk, 'that the accuser swears to the identity of the criminal;' and then turning to Valentine, he inquired his name and address."—vol. i. p. 289—291.

He gives a minute detail of his adventure, but is heard with incredulity, and almost every circumstance is turned against him :

" The two women servants declared that no one slept in the house but themselves and their master—that he had gone to bed well on the preceding evening—that the house door was shut, but not locked, and could not have been opened from without, but by picking the lock,—the lock was picked—they had heard nothing unusual during the night ; and the first that came down stairs in the morning had stopped at her master's room to awaken him, as was customary—that on finding the door locked, she had called her fellow servant and searched vainly for the key—that they had first supposed it was their master that was speaking to them—but that on finding the house door ajar, they were satisfied some one had got in during the night ; and they had therefore both ran off to the town instantly for assistance, neither having courage to stay behind.

" The police officers then related, how, on receiving the summons, they had hastened to the spot and broken open the bedroom door—that there were evident marks of an attempt to force the lock, and part of the blade of a clasp-knife was found on the floor.

" Here the clerk interrupted the evidence to suggest that the prisoner should have been searched at the commencement of the investigation. This omission being repaired, they found on Valentine's person, a purse containing a few franks, a silk pocket handkerchief, a note book containing memoranda of the business he had to do, and a clasp-knife, the broken blade of which exactly fitted the fragment the officers had picked up.

" Though Valentine had himself avowed his attempt to make his escape by picking the lock, yet, on the adjustment of the fragments, every body in the room looked at one another triumphantly, and seemed to consider this coincidence as the indisputable condemnation of the prisoner.

" The officers then continued to say, that they had found no one in the room but the gentleman in the bed, who had desired them instantly to pursue the assassin who had escaped by the window, which was open, and to fetch a surgeon ; and concluded their evi-

dence, by relating how they had found the prisoner hiding himself in a ditch.

“ ‘Hiding myself!’ exclaimed Valentine indignantly—‘look at this swollen limb, and you’ll have no difficulty in conceiving why I was found in a ditch.’

“ ‘Sans doute,’ rejoined Bontems, the clerk, ‘e’était un malheur ; but for that you might have escaped altogether.’

“ ‘C’était la Providence,’ said the priest. ‘The guilty man caught in the Almighty’s snare!’ and he crossed himself devoutly at the idea of this signal instance of Divine intervention.

“ ‘Now then, Monsieur Bruneau,’ said the Justice, turning to the wounded man, ‘we shall be happy to hear your account of the affair. Imprimis, did you ever see the prisoner before?’

“ ‘Never, till I saw him in my room last night,’ replied Bruneau.

“ ‘Did you see him enter it?’ asked the Justice.

“ ‘No,’ returned Bruneau, ‘I was asleep. It was the blow which inflicted this wound, (and he opened the bosom of his shirt as he spoke, and displayed the bloody bandages that crossed his breast,) which first awakened me ; but I believe I fainted instantly. When I came to my senses, I found myself bathed in blood, and my first thought was to try and ring the bell. But when with difficulty I had raised myself in the bed for that purpose, and drawn aside the curtain, I saw the window open and a man apparently endeavouring to make his escape by it. I fancy it was the cool night air from the open window that had recalled me from my swoon. I believe he heard me move, for he turned suddenly round, and it was then for the first time my eye fell upon the face of the prisoner. The fright and the exertion together overcame me, and I fainted again. When I recovered the second time, hearing the breathing of the assassin near me, and fearful that if he found me alive, he might be tempted to complete his work, I lay as silent and motionless as I could, till I heard and saw him escape by the window. Then I made another attempt to ring the bell, but found that the cord had been cut away, and that it was out of my reach.’

“ ‘Which indicates premeditation and malice aforethought on the part of the prisoner,’ said the clerk.”—vol. i. p. 292—296.

No motive could be suggested, and nothing was found on Valentine from which an intention to rob could be inferred, but the only person who firmly believes him innocent is Julie, and she immediately sets to work to bring the true murderer to light. Her first step is to procure a suit of boy’s clothes from a runaway page, and then off she sets with a caution to

her waiting-maid to say that she is gone on a visit to her aunt :

“ ‘ Bien,’ replied Madeleine, ‘ I will. Mais Dieu !’ she exclaimed, as the suspicion struck her, ‘ you’re not going to shut yourself up with Mr. Valentine in the maison forte ?’ ”

“ ‘ Not I,’ said Julie, ‘ what good would that do ?’ ”

“ ‘ Car, Mademoiselle,’ said Madeleine, ‘ vous savez qu’un jeune homme est toujours un jeune homme, maison forte ou ailleurs ; et que quoique vous soyez mise en garçon, vous êtes demoiselle, tout de même.’ ”—vol. i. p. 304.

Madeleine’s fears are groundless. Julie’s point of destination is the *cabaret* to which she had tracked Valentine’s conductor. She there hears the murder talked over by the old woman, who keeps it, and her son, in a manner to show that they have at all events some connection with the party, and in the room where she is put to sleep is a small portmanteau marked with the initials R. B. The murdered man was a Monsieur Bruneau, and he has a son named Rodolphe.

She passes a quiet night and is suffered to leave the cabaret the next morning, but her inquiries excite suspicion, and she suddenly disappears. After waiting the appointed time, her maid repairs to the police and places in their hands a piece of paper left by her mistress containing only the words, *Le Cabaret de Monsieur Rodolphe*. To find out this cabaret is the question, and Townshend himself would not be ashamed of the devise hit upon by the commissary. He takes the real page dressed in clothes like those lent to Julie, visits each of the suspected cabarets in turn, and narrowly watches the countenances of the occupants :

“ In this manner they visited one after the other the houses that Simon thought most likely to be the scene of some mysterious or illegal proceeding, but so far without the slightest indication of succeeding in his object. ‘ Allons !’ said he, ‘ encore un autre,’ and he turned down a narrow street and entered the cabaret of La mère Grimaud.

“ There was no one in the room but an old woman, who was at that moment on her knees gathering up with a wooden spoon a heap of barley seeds which appeared to have been accidentally spilt on the floor. As she heard the sound of Simon’s foot, she looked round, and seeing as she supposed, a customer—she said, ‘ Ah !

pardon, Monsieur, come in and I shall be at your service directly—I must just gather up these first, lest they be trod on.'

" 'Permit me to help you,' said André, who at that moment emerged from behind his companion, and advanced towards her.

" 'Comment ?' cried or rather screamed Madame Grimaud, 'Vous êtes—?' and there she stopped, with her mouth open: and her eyes fixed on André's face, which evidently puzzled and confounded her.

" 'Bien !' said Simon to himself—' nous voilà !' "—vol. ii. pp. 24, 25.

They are still at fault, for the old lady proves impenetrable, and all Simon can do is to set a watch upon the house. Now comes the explanation of the mystery. Two horsemen alight at an inn near Nantes, and it transpires from their conversation that one is Rodolphe Bruneau, the son of the murdered man, the other Rodolphe Grimaud, the son of the old woman of the cabaret, and that the murder has been committed by the first with the knowledge of the latter. They have been alarmed by the inquisitiveness of Julie, who is shut up in the cabaret, and they are deliberating on the expediency of killing her. The task is assigned to Grimaud, and he enters Nantes to execute it:

" The streets were nearly deserted by the time he turned into that narrow one wherein his mother dwelt. One or two persons, apparently hastening to their nightly rest, crossed him as he past down. Softly, softly, he inserted the key and turned it in the lock—at that moment a man in the dress of a labourer came hastily by—' Can you tell me,' said he, ' if it be past midnight ?'

" 'Midnight has struck,' answered Rodolphe.

" 'Bon soir,' said the man as he moved on his way, and Rodolphe entered and gently closed the door. He turned into the room where Julie had first seen him, and which served the purpose both of kitchen and parlour. It was empty as he expected, and all within the house seemed silent. He took up a piece of wood that lay upon the hearth and raked back the ashes with which the old woman had covered the smouldering logs to keep in the fire till morning; then he took a rushlight out of a drawer—lighted it, and sat down in his mother's chair. He felt that the deed once done, he must fly, and that all the pause he had was before. He knew that he should never see his mother again, and after some reflection he resolved to write to her, and leave the letter where she would find it in the morning. So he wrote, not saying why he had returned, nor alluding

to Julie; but giving her his last farewell, and bidding her not curse him. Then he arose, made a strong effort to call up the man within him, and cast off the softness that the thought of his mother had gathered round his heart—walked firmly to a drawer where knives were kept, examined them deliberately and artistically—rejected them all, saying, ‘No, a razor is more sure,’ and taking off his shoes, proceeded up stairs to his own bed-room to fetch one. He placed his ear to his mother’s door, but no sound reached him; ‘she sleeps sound,’ he murmured, ‘that’s well;’ and he descended the stairs again. Before he put on his shoes he passed the razor over the sole of one of them to clean the edge—then he took off his coat tucked up his shirt sleeves above the elbow, and with the candle in one hand and the razor in the other, he left the room, proceeded along a narrow passage which led to the back of the house, put the razor into his mouth and the candle on the floor, whilst he raised a trap door which formed the entrance to the once well-filled cellar, where they still kept the small quantity of liquors their humble trade demanded. There was a bolt to the trap which should have been drawn—it was not; but Rodolphe’s mind was too much absorbed to observe the neglected caution. The pannel being raised, a ladder appeared, by which the descent was to be made; but being almost perpendicular, it was necessary to turn round and go down backwards. Rodolphe did so, cautiously and softly, for he would have been glad that his victim were asleep—step by step he descended—the razor still in his mouth and the candle in his hand—he reached the last round of the ladder—the next step was deeper—he stretched out his foot to place it firmly on the ground—he trod on something—it was not the earth—it gave way beneath his weight—he stooped the rushlight and looked down—and saw he was standing on his dead mother’s breast. Horror seized him—he dropped the razor and the light—rushed up the ladder, and fled amain.”—vol. ii. p. 45—48.

The old woman had stumbled as she was descending with food for Julie, and broken her neck before the prisoner had time to identify her.

“At first she momentarily expected the person, whoever it might be, to speak or stir, but as minute after minute passed and all remained motionless and silent, fear and surprise grew into horror—she was no longer alone, she knew she had a companion, though to her invisible; who was it? what was it? was the visitor alive or dead? ‘Perhaps,’ thought she, ‘it’s a corpse; some murdered, bleeding wretch they have flung down here!’ and she crawled fur-

ther and further away, and squeezed herself closer and closer to the cold damp wall, her living, creeping flesh scarce less damp and cold than it. From this horrid trance she was, at length, aroused, by the lifting of the trap door a second time, and seeing Rodolphe slowly descending the ladder with the razor between his teeth. That he came to murder her she felt assured ; but in an instant, before she had time to discern the cause of his precipitate retreat, the light was suddenly extinguished and he was gone. When the house was entered shortly afterwards by the police officers, the trap was found open ; the old woman lying cold and stiff at the foot of the ladder with the candle and razor beside her ; and Julie sitting of a heap, with her face buried in her lap, utterly speechless."—vol. ii. pp. 52, 53.

Hearing nothing of his friend, Rodolphe Bruneau ventures on a nightly visit to the cabaret, and is apprehended by the police, but nothing appears against him and he is on the point of being discharged, when the little portmanteau found by Julie is produced.

" 'Has the portmanteau been examined ?' inquired the Justice.

" 'It has been looked into at the police office,' returned Simon, 'in the presence of the Lieutenant ; but the contents are left exactly as they were found.'

" 'Let us see them,' said the Justice. Upon which, the portmanteau being opened, they discovered rolled up, and lying on the top, a shirt which had evidently been worn, and which, on being unfolded, exhibited stains of blood upon the wrist. There were also a few other articles of dress, and necessaries for the toilet, one of which was wrapped in a letter, which on examination proved to be in the writing of the late Monsieur Bruneau, and was addressed to Rodolphe, at Le Mans. It was evidently an answer to an application for money ; and conveyed, with many reproaches, a positive refusal. The post mark was on it, and it appeared to have been duly sent and received. But when Simon shook out the shirt, another piece of paper appeared, which had been wrapt in it. It was the half of a letter also in the hand of Monsieur Bruneau, and clearly addressed to the same person as the other—and there was enough of it legible to decipher, that it contained a proposal, on certain conditions, of making an addition to his annuity of four thousand franks. There was no post mark on the paper, nor did it appear that it had ever been forwarded.

" 'That letter,' said the Procureur, 'must have been written on the very evening previous to the assassination, and taken out of the

house by the assassin, whoever he was; for it was on that very afternoon, that Monsieur Bruneau spoke to me on the subject, and proposed this means of shaking off an annoyance that kept him in a constant state of irritation.'

" 'Do you admit that the portmanteau is yours?' said the Justice to Rodolphe.

" 'I admit that it *was*,' replied he, 'but I presented it some time since to Grimaud.

" 'With its contents, I presume?' said the Procureur, ironically." vol. ii.—p. 66—68.

The proof is completed by the evidence of the landlord of the inn where Rodolphe left his horse on the night of the murder. The landlord stated, that, after putting up the horse, he had had occasion to go to a neighbouring shop for some medicine :

" 'Whilst the man was mixing it, the gentleman who had left the horse entered precipitately, and inquired if there was a surgeon to be found in the neighbourhood; and they directed him to Monsieur Le Moine's, hard by ——'

" 'Is there a surgeon of that name in the Rue de Mousseline?' interrupted the Procureur.

" 'There is,' answered Gilles; 'and the gentleman hurried away to fetch him. I suppose he came to Nantes to seek some sick friend. I don't think he observed me, but I recognized him immediately.'

" Here ended the mystery. Not only Gilles, but the man in the druggist's shop, swore to the person of Rodolphe Bruneau, who, when he found further subterfuge was vain, admitted his guilt. There was, however, one saving clause in the dark story which mitigated his sentence from death to the galleys. The crime was no sooner committed than remorse seized him—he had hurried out of the room and the house, carrying with him the letter he had seen lying on a table by the bed-side addressed to himself, and which by the light of the lantern he bore he contrived to read. Then it was he hastened in search of a surgeon, by whose assistance he thought his uncle's life might yet be saved; certain, that as the blow had been struck when the old man was asleep, he himself had not been recognized, and quite satisfied that the Grimauds, the only persons who were in the secret of his having visited Nantes, would never betray him. It had been his original plan, the murder once committed, to remount his horse and return with all speed to Le Mans; but the apprehension and dismay that instantly took possession of his mind

confounded his arrangements. He, therefore, after he had shut up the supposed surgeon in the wounded man's room, which, by the way, he locked, lest Valentine should pursue and trace his own steps to the cabaret, hastened hither himself, ascended to the chamber above, where he changed the stained shirt for one he had provided himself with in case of such an emergency; and then, without disclosing the truth to the Grimauds, or bearing about himself any signs of guilt, instead of returning to *The Poisson Rouge* to fetch his horse, the doing which he feared might make it more easy to trace him, he hastened out of the town on foot. Thus did the very precautions he used lead to his detection; and thus may we say with Simon, 'c'est leur destinée qui les mène.'—vol. ii. p. 75—77.

This story is forced and improbable; nor can it have escaped observation that the only material evidence against Valentine is not circumstantial, but direct—the oath of the murdered man, that he (Valentine) was the murderer. Every mere presumption was in his favour; indeed it would have been no easy matter to account for his conduct on any hypothesis of guilt. As for the mode of discovery, it is of the most common-place order, and can hardly be admitted as a confirmation of the aphorism which it is the author's grand object to maintain, that murder will out. A criminal tracked to his wonted haunt—a suspicious portmanteau left with an accomplice—a horse abandoned at an inn—these surely constitute a very ordinary and daily occurring description of machinery.

As regards the main plot, this narrative is purely episodic, for far from its being necessary for us to become acquainted with Julie's parents, all we are required to know about herself is, that she followed the vocation of a milliner, and in due time was seduced by Gaveston under the name of Godfrey. It was in consequence of his desertion that she had attempted to destroy herself.

There are several distinct stories or sets of adventures yet to come, so that it is quite impracticable to go on analyzing or abridging. We have the adventures of Harry Leeson, whom Gaveston drives from the house by unkindness—the adventures of a Mrs. Aytoun, who is unjustly accused of theft and adultery—the adventures of a family named Cripps, who are fools enough to mistake a swindler for a foreigner of rank—and

the concluding adventures of Mabel the dairy-maid, who, failing to become a marchioness, has become the kept mistress of a duke. Compelled, therefore, to make a selection, we fix on Mrs. Aytoun; because we incline to think that some passages in her history are calculated to produce a painful degree of apprehension and uncertainty.

Mrs. Aytoun is the wife of a commercial traveller, young, pretty and fond of admiration, but attached to her husband and well principled in the main. He is absent on a journey which is expected to detain him some months, when she has occasion to buy some articles of millinery at a shop where she was accustomed to deal. She has ordered some pieces of lace to be sent for her to choose from, and is leaving the shop, when the shopman suggests that a piece of lace is attached to her handkerchief, and in point of fact it is found hanging from her pocket. This incident passes off without further observation, and the next morning the articles are sent. A visitor being with her, she requests that they may be left; two hours afterwards the shopman returns, she makes her selection, the quantities required are cut off, and the remainder carried away—

“About an hour had elapsed, and she was sitting in her parlour inspecting her purchases, which were spread out on the table, when there came a loud ringing at the bell, and presently Susan ushered in Mr. Green, who desired to see her immediately.

“‘I am sorry, Ma’am,’ said he, in rather an insolent tone, ‘to be obliged to trouble you; but there is a whole piece of lace missing from the parcel I sent here, besides some yards of another. The silk returned also is short of the measure it ought to be, by several yards.’

“‘Good heavens, Sir!’ said Alicia, quite alarmed, ‘I am very sorry; but your man himself measured and cut off what I kept.’

“‘No doubt, Ma’am,’ replied Mr. Green; ‘I’m aware of that. But the goods were left here some time by your desire; and the thing looks very awkward.’

“‘You don’t intend to imply that I have your lace!’ exclaimed Alicia, indignantly.

“‘I don’t know who else can have it,’ replied Mr. Green; ‘unless you have any reason to suspect your servants.’

“‘No,’ replied Mrs. Aytoun, ‘I do not suspect my servants; and indeed I am quite sure they were neither of them in the room whilst your goods were here.’

" 'I'm very sorry to do any thing so unpleasant, Ma'am,' said Mr. Green, 'but you must permit this gentleman to search your person ;' and upon that he called in an officer that he had brought with him, and who was waiting in the passage. Alicia's horror and indignation may be conceived. She rang the bell furiously for Susan, who, suspecting nothing of what was going on, had returned to the kitchen after showing in Mr. Green.

" 'Susan!' she exclaimed, bursting into tears, 'this man accuses me of having kept back some of his goods and insists on having me searched.'

" 'Lord Sir!' cried Susan, almost as much shocked as Alicia, 'I'm sure my mistress wouldn't keep your things. How can you think such a thing?'

" 'Unfortunately,' replied Mr. Green, 'this sort of thing happens too often. I am sure three hundred a year wouldn't cover my losses by the dishonesty of the ladies who frequent my shop; and I'm determined to pursue the thing with rigour that it may be a warning to others. So if you please, Ma'am, searched you must be.' And accordingly the officer proceeded to fulfil the unpleasant duty.

" 'Nothing however was found upon Alicia, nor in the room, every part of which they examined. They next proceeded to search the other parts of the house, drawers, servants' boxes and every thing, but with equal ill success.

" 'Nevertheless Mr. Green still affirmed that the goods had been abstracted by somebody in that house; that he wouldn't mind taking his oath of it in any court of justice in Europe; and he insisted Mrs. Aytoun should accompany him and the officer to a magistrate.

" 'I may never recover my goods,' said he, 'for I know how easy it is to conceal these sort of articles, or get them conveyed out of the house—I don't recover one time in ten; but as I said before, I'm determined to pursue this business—I'll follow it up, I'm resolved, just to let ladies see these things can't be done with impunity.' "—vol. ii. pp. 185—188.

She is accordingly taken before a magistrate, who requires her to find bail, and she is on the point of being committed for want of it, when an amateur of beauty in distress, the Honourable Mr. Seymour, steps forward from amongst the bystanders, and proposes himself.

Here again, the only presumption, a very weak one, against the accused party, was the piece of lace taken up

with the handkerchief. The essential charge rested exclusively on the oath of the shopman, that a certain quantity had been cut off in Alicia's house; and to suppose that on such evidence any magistrate would hold a woman in Alicia's situation to bail for a felony, is preposterous. The issuing of the search warrant (for we presume there was one) was a pretty strong measure; but when nothing had been found, all attempt to make the loss the subject of a criminal prosecution against Alicia must have been dropped.

It turns out in the end that Mr. Green's nephew and confidential clerk was the culprit, and had been in the constant habit of robbing him; but the consequences of the accusation to Alicia are nearly fatal to her reputation and peace of mind. Mr. Seymour makes the most of the opportune service he had been the means of rendering her, and pays her frequent visits, under the pretence of talking over the best means of extrication. To avoid him she goes to reside at a lodging out of town, but is induced to give him a meeting to arrange a final settlement with Mr. Green. At this critical period her husband returns, he finds her in new lodgings of which she had said nothing, and far advanced in a state of pregnancy, which she had concealed from him by way of an agreeable surprise; he learns by accident that she has an appointment in Kensington Gardens, and on hastening there finds her in a lone spot leaning against Mr. Seymour, who has thrown an arm round her to prevent her from falling when she discovers that they are watched. He knocks down the supposed seducer; fights a duel with him; shoots him without waiting for the signal; is taken up and about to be tried for murder, when his wife persuades Mr. Seymour's friends to drop the prosecution, and succeeds at length in convincing her husband of her innocence.

We have heard a story of a French woman of gallantry, who, on being detected by her lover in an unequivocal act of infidelity, stoutly protested her innocence: "What! am I not to believe my own eyes?"—"Certainly not in opposition to my word, if you really love me as you say you do." Mrs. Aytoun must have been introduced for the express purpose of impressing this rule of conjugal construction on the married world of England, for really the evidence against her was enough to shake a dozen reputations standing on a much surer founda-

dation than her own ; and we do not exactly see the advantage of proving that a woman may be guilty of a succession of imprudent acts, and voluntarily assume the semblance of impropriety, without deserving the punishment of guilt.

We have only just space enough remaining to explain the winding up. An attempt, as we have already stated, is made to connect the whole of the different stories, but with indifferent success. The first important clue is afforded by the discovery of Mr. Wentworth's will, which is brought to Mr. Oliphant, his solicitor, by a Jewish receiver of stolen goods, through whom it is traced to Julia's seducer, not yet known to be Gaveston. On being informed of this discovery, Gaveston induces Julia to leave the kingdom with him, and flings her into the Seine, whence she is rescued by Mr. Simpson, the acting partner in the wine trade. But still no one brings a direct charge against the grand criminal, and it is on the trial of his accomplices for an independent crime that the original murder is brought home to him. The broken-nosed man, who aided Gaveston, is the friend of the *soi-disant* Count who has married into the Cripps family. They accompany the young ladies into the south of France, and there leave them to engage in a smuggling expedition on a large scale. They are met by Mabel and her protector, the Duke, who recognises his own quondam valet in the valet, and immediately gets shot for his pains. They are brought to trial at Lisle for the murder of the Duke, and Gaveston appears to invalidate the testimony of Mabel, the only witness against him. Oliphant the attorney, Simpson the partner, Susan, Julia, Harry Leeson, &c. &c., all happen to be present, and the various items of proofs which each has been collecting for years, are produced against him. The result is, that, instead of exculpating his associates, he thoroughly inculpates himself.

" Previous to the execution of the prisoners Remorden and Dillon, several efforts were made to induce the former to make known the real particulars of Mr. Wentworth's murder, and more especially to disclose the fate of Andrew Hopley ; but all persuasions were ineffectual. He had promised Gaveston, provided he would corroborate the story Monsieur P  rier was instructed to relate, that he would appoint him heir to the Remorden property ; and that whether the defence proved successful or not, he would never betray the secret—and he kept his word.

"But what human lips refused to reveal, the labours of the road-makers ere long disclosed.

"Mr. Gaveston, when he left the court, seeing that all that remained for him was a life of infamy or a disgraceful death, fled with all speed to Brussels, where, after making a will, bequeathing whatever he had at his disposal to little Julia, his only child, he retired to his chamber in the hotel, and blew out his brains.

"As soon as his death was known in England, Mr. Borthwick naturally allowed the road to follow the line proposed; and when they broke up the grounds of the old Manor House, in the deep dry well alluded to by the cronies in the early part of our story, under a heap of withered branches and furze, were found the remains of Andrew Hopley, with his clothes and other articles, amongst which were the remnants of a shirt stained with blood, marked 'W. G.,' and bearing in one of its sleeves the fellow stud to that in Susan's possession.

"We may here close our volume in the words of Monsieur Périer—'Our simple and unvarnished tale is told;'—but we venture to hope with somewhat better success."—vol. iii. p. 343—345.

Never, in our opinion, was story less entitled to be called plain and unvarnished, and a more impotent conclusion we never remember to have read. The very least we expected was, a trial at the Old Bailey, a nice balancing of conflicting evidence, an impressive defence by Mr. Charles Phillips, and a solution of the mystery by the unexpected appearance of Andrew in the witness-box. We are confident this might have been effected without a greater shock to probability than is produced by the unsatisfactory trial at Lisle. The book, however, is one of great power, but it is ill regulated power, and the author is palpably deficient in the kind of information most wanted. He knows little or nothing of the principles, to say nothing of the technical rules, of evidence; and we enter a concluding protest against any inferences of any kind, that may be drawn from his statements or narratives, regarding the administration of justice or the received maxims of criminal jurisprudence in this country.

H.

ART. XI.—CRIMINAL RESPONSIBILITY OF DRUNKARDS.

The Cabinet Library of Scarce and Celebrated Tracts. Law Series. Vol. II. Part 2. On the Effect of Drunkenness upon Criminal Responsibility, and the Application of Punishment. Translated from the German of Professor C. J. A. Mittermaier. Edinburgh. 1841.

THIS is an ingenious essay on a curious question by a remarkable man, and we propose to extract the pith of it.

The author begins by stating the doctrines of the Roman law, the canon and imperial law, the German jurisprudence, and the modern legislation upon the subject, and then proceeds to lay down the principles by which the "imputability" or criminal responsibility of the drunkard is to be determined, which leads to a nice analysis of the different degrees of inebriety.

"The whole course of the development of the subject," he remarks at the outset, "will show that it would be just as erroneous to lay down the principle, that drunkenness does not relieve from criminal responsibility, as it would be to assert, that the highest degree of drunkenness is always a ground of exemption from responsibility. A nice discrimination between premeditated, intentional, culpable, and inculpable drunkenness, and between the state of body induced by habitual drunkenness, and the appetite for liquor merely, can alone furnish a safe practical guide in the application of the law to particular cases."

The Roman law contains no general provision on the subject, but in the earliest period, when the judges merely discharged duties analogous to those of the modern jury, they could acquit altogether if the party appeared guiltless of any evil intention, and M. Mittermaier supposes that this power was not unfrequently exercised in respect to drunkards. At a later period, when the same judges decided both the question of guilt and the degree of punishment, drunkenness was regarded as a mitigating circumstance in most cases where deliberation and consciousness were of the essence of the crime.

In the canon law, drunkenness is expressly mentioned as a ground of indulgence, and the main reason given is, that God

had indulgence for the offence committed by Lot under the influence of wine.

In the imperial law, there is only a single passage intimating that some allowance was to be made for drunkenness, and this passage relates to blasphemy.

The doctrines of the old German jurisprudence, which M. Mittermaier describes as based on the Roman law according to the interpretation of that law in the middle ages, have varied considerably upon the point, but about the sixteenth century the opinion began to prevail that the offender was not to be held liable for the highest degree of criminality unless he got drunk intentionally, and with a consciousness that he might commit a crime when in that state.

“ At this time, also, the different kinds of drunkenness began to be accurately distinguished from one another, and that only was permitted to have an influence, which deprived the subject of it of the use of reason. These views gradually determined the German practice, though with manifold distinctions, which, certainly, were sometimes more subtle than practically significant, as, for example, the distinction between *ebrius* and *ebriosus*. In Germany, especially, these doctrines found a decided entrance; and the testimonies of Gail, Carpzov, and Bohmer, who follow substantially the opinion of Clarus, leave no doubt whatever on the subject. The more indulgent opinion, in regard to the influence of drunkenness, prevailed also in the practice of Italy, Spain, Portugal, Holland, and the Netherlands. It seems the more striking, therefore, that in three states of Germanic origin, namely, France, England, and Scotland, the doctrine in reference to this matter should have developed itself in a direction precisely the opposite of that sanctioned by the German practice. But this fact will seem less strange, when it is recollected, that, already in the middle ages and even in the sixteenth century, some jurists,—setting out with the principle that drunkenness is in itself a punishable offence, and that those who commit offences while in a punishable state deserve no exculpation, and also that it would be attended with too great danger to society, to attribute a mitigating power to drunkenness, which can so easily be pretended as a cloak for crimes,—established the doctrine, that drunkenness in no case exculpated from the ordinary punishment. These views, strengthened by the principle of intimidation, which, in former times, was allowed to prevail over that of justice, operated in France and England the more readily, by reason of the fact, that in those countries the manners of the people

were far more opposed, than they were in Germany, to the practice of drunkenness. Thus in France an ordinance of Francis I. of August 31, 1536, chap. 3, art. 1, declared that drunkenness should not in any case absolve from the ordinary punishment; and this principle was sanctioned and applied by the French jurisprudence. Similar views prevailed in England, and the doctrine laid down by the classical Hale, which regards drunkenness as a *dementia affectata*, determined the opinions of the later English jurists; though the sound understanding of these writers compels them to admit that drunkenness diminishes the responsibility, and produces an exemption from punishment, when intoxication takes place without the fault of the drinker, as when it results from the act of other persons, or when a real insanity is induced by habitual drunkenness. In England, as is well known, the Roman law found no entrance; and this fact explains the more readily why the indulgent doctrine founded in the law 11, D. *de pœnis*, which prevailed in the rest of Europe, could not extend itself there. In Scotland, where the Roman law obtained great influence, similar reasons to those advanced by the English jurists seem, notwithstanding, to have prevented the introduction of the milder principle."—p. 7—9.

In modern legislation the difficulty has generally been evaded, and to understand the operating law, we must look to the practice of the courts, as well as to the letter of the enactments :

" The doctrines of the modern legal systems of Germany remain true, essentially, to the old German practice; but the manner in which these doctrines are expressed, depends upon the character of each particular code. In the Prussian Landrecht, which does not profess to give a complete enumeration of all the grounds for the removal of accountability, it is not strange that we find nothing more than a general intimation concerning drunkenness, from which, however, so much may be concluded, that where it has its origin in gross fault, the punishment of fault only is to be inflicted for a crime committed therein; and, in the annals of Prussian criminal justice, we find that even where a father in a drunken fit killed his child, the offender was only punished by one year's imprisonment.

" The Bavarian code also contains no general rule in regard to the punishment of an offence committed by a drunken person, though in articles 120 and 121, it undertakes to enumerate all the grounds which exempt from responsibility. But this omission is only a seeming one, inasmuch as the general expression, 'inculpable disorder of the senses or of the understanding,' in article 121, includes drunkenness.

“ The Austrian code, without distinguishing between culpable and inculpable drunkenness, considers complete intoxication, when not brought upon one's self with a view to the crime, as a ground of exculpation from responsibility.

“ Wholly different from this view is that of the French legislation. In the present penal code of France, drunkenness is not mentioned at all ; and, as article 66 declares expressly, that no crime can be excused but upon some ground of exculpation acknowledged and provided in the law, it would seem, that, by the French law, drunkenness is not in any case a ground of relief from the ordinary punishment ; which is not difficult to understand, when it is recollected, that, as has already been observed, the earlier doctrines of the French jurisprudence in regard to drunkenness did not allow it to have any mitigating effect. For the first years after the publication of the code, this severity of doctrine, in consequence of a servile adherence to the letter of the law, combined with the operation of the principle of intimidation, which reprobated all exculpation on account of drunkenness, was rigidly maintained in the French courts. But by degrees, the milder view prevailed also in France ; the severity of the French legislation was found fault with ; greater freedom was demanded for the judge, to enable him to consider drunkenness as a ground for moderating punishment ; and the writers on the subject soon went further, and undertook to show, that, according to the existing law, an offence committed in a state of real drunkenness, which was not intentional, ought not to be punishable in the same degree as a premeditated crime. These opinions sometimes found their way into the courts themselves ; and the admission of drunkenness as a ground of extenuation was justified by the penal code, on the ground, it was asserted, that drunkenness produces a temporary insanity, and that, according to article 64 of the penal code, every kind of insanity, without distinction, is a ground of exculpation. It cannot be strange, therefore, that for some years juries in France have admitted drunkenness as a ground of exculpation, and have accordingly pronounced verdicts of acquittal. Inasmuch as juries are not liable to be called to account for their verdicts, and the question put to them, ‘ Is the accused guilty,’ requires them to decide upon the guilt of the accused, it becomes still easier to understand these acquittals. It is only to be lamented, that the idea of the so-called omnipotence of juries not seldom leads them into error ; and that their desire to divert the ordinary punishment of the law from an offender induces them to pronounce a verdict of not guilty ; so that one who has committed an offence in the highest

drunkenness is wholly freed from punishment, when he has well deserved the punishment of *culpa*."—p. 10—12.

This certainly is the inevitable result of leaving offences ill-defined, but we do not see how the evil is to be cured, when the degree of guilt depends on the circumstances, and any positive recognition of the legality or innocence of certain infringements of the law might prove mischievous. For example, we would rather suffer juries to stretch a point occasionally in favour of duels, than legalise them; and the principle equally applies to drunkenness.

The rest of the modern continental codes and projects differ widely:

"The Netherlands project of a criminal code, of 1827, article 33, declares, that where the drunkenness is accidental or involuntary, it is, but where it is premeditated or voluntary, it is not a ground for moderating or exempting from punishment. In the revised project of Bavaria, of 1827, article 67, the words of article 121 of the criminal code of 1813 are retained, with the exception of the word 'inculpable;' while, on the other hand, the project of Baron von Strombeck does not mention drunkenness expressly, but yet speaks of a transitory, inculpable condition, arising from an entire disorder of the senses, or from a defective activity of the reason. The Hanover project, article 99, retains the words of the Bavarian criminal code, but adds thereto expressly, 'namely, in cases of the highest degree of inculpable drunkenness;' and, then, in article 109, number 6, it mentions drunkenness generally among the grounds for moderating punishment. The Zurich project of 1829, declares that one who intentionally commits a legal injury, while in a state of inculpable drunkenness of the highest degree, is punishable in the same manner as if he were under age. The criminal code of Luzerne mentions inculpable drunkenness as a ground of exemption from responsibility."—pp. 13, 14.

M. Mittermaier begins his chapter on principles, by stating that there is none capable of a satisfactory application. The principle of freedom he rejects, as affording no assistance to the judge, "for every offender has freedom, and by his own fault and choice is brought into that state of mind in which he chooses the crime, as a means of gratifying his passions,"—an argument which confounds general freedom or free will, with freedom at the time. He also rejects the use of the

understanding or reason on the part of the actor as a test, on account of the vagueness of the terms and the different senses in which they are used :

“ In reference to imputability, the only proper inquiry is, whether the actor, at the time of the act, (and, as it were, of himself,) possessed a consciousness of his act and its consequences, and its relation to the law; and where this consciousness is wanting, imputability ceases. The law considers every one responsible, when he knows what he wills to do according to its effect, and is in a condition to subsume the act under the law; because when these conditions exist, the actor may then be withheld from the act, by his inward sense of its not being permissible, and by the legal prohibition to commit it, of which he has full knowledge; and, if he, notwithstanding, commits the act, it shows that he wills to do that which is known to him to be forbidden. But this consciousness, which is the condition of imputability, is obliterated in one who is in a state of complete drunkenness. In consequence of the physiological operation of drunkenness on the bodily organization, and the consequent increased circulation of the blood, the ordinary nervous activity is disturbed; the accustomed series of ideas is interrupted; the consciousness of the external world is darkened; images and phantasies, which arise in the soul after the manner of dreams, and which the calm consideration of the external world, in a sober state, would teach to be unreal, become overpowering; and the unbridled imagination gives to the flow of these images a strength, which hinders the operation of the accustomed ideas,—creates a disorder of the soul,—and, in the excitement of the nervous system, effects a delusion of the drunken man, while, at the same time, it lends a power to the appetites arising from these eccentric images, which the deterring representations of reason are unable to surmount. The drunken man loses the consciousness of the external world; the friend, whom in his sober mind he loves, is now regarded as an enemy, in whose every, even the most innocent, look, he imagines he reads a threat; it is no longer in his power to refer what he wills to do to the law, for the voice of reason is silent for him; he no longer knows what he does; and he consequently acts without responsibility, because he acts without consciousness.”—pp. 15, 16.

This passage is not quite satisfactory. We should be slow to admit that knowledge of the legal prohibition is an essential ingredient in imputability.

The subsequent answer to the principal objection, that the

drunkard has brought himself into this state of his own free will, is conclusive. This proves that he ought to be punished for getting drunk, but leaves the main question, how far he can be deemed a voluntary agent in respect of the crime, precisely where it stood.

The argument, that the idea of punishment and the consciousness of guilty intention may operate on the drunkard through his ordinary association of ideas, is more plausible, but is hardly applicable to cases in which not merely all capacity for reasoning, but all distinctness of impression and the very power of discriminating personal identity, have been lost. A man who kills his friend under the notion that he is defending himself against a robber, has no culpable intention which habitual association might have checked.

Again, the analogy between drunkenness and passion fails in the essential point :

"One, who is subject to the influence of passion, has yielded to his strong feelings, and allowed them a dominion over his life, which denies or weakens the deterring representations of the law; it is through his own fault that the angry man becomes inflamed with rage, since he might have withstood the first movements of his passion; and besides, every fit of passion has its root more or less in a previously existing appetite or passion, and a crime committed therein is always in a greater or less degree the product of premeditated selfish motives. When an angry man kills his enemy who has injured him, in this case there are circumstances preceding the passion, which excite to crime, and which are conflicting in the soul of the actor, with the idea of the wickedness of the act, and of the punishment provided by the law; while a drunken man, on the contrary, commonly acts without reference to the relations which precede his drunkenness, and kills perhaps his best friend, who merely endeavours to withstand the outbreak of his fury."—pp. 18, 19.

So far, so good; but when M. Mittermaier goes on to argue that the passionate man is also open to the imputation, because he has suffered his passions to gather uncontrollable force by indulging them, he uses an argument which may be fairly turned against the majority of drunkards.

The ensuing remarks on the different degrees of drunkenness are full of nice reasoning and clear analysis; but the distinctions are both too numerous and too refined. "Life," it is justly observed, "in the never ending fulness of its combinations,

makes every attempt to bring all possible cases within sharply defined classes ; the different degrees flow into one another ; will it always be discretionary whether a given case shall be placed in the first or second degree." Leave it, therefore, to the judge or jury to decide in each individual case whether the crime has been committed with an imputable degree of consciousness ; but it is foreign to the question to institute a minute inquiry into the prior moral and physical condition of the accused.

The German jurists differ upon the point, whether a man who gets drunk for the express purpose of committing a crime, is to be subjected to the ordinary degree of punishment. It strikes us that no doubt can be reasonably maintained of his full guilt, unless, indeed, when he commits a different crime from that originally meditated—as when, having got drunk to commit a rape, he commits murder. Here, according to M. Mittermaier, the guilt would depend on the degree of connection existing between the crimes ; in other words, on whether the premeditation could be referred to that actually perpetrated. According to the English law, drunkenness in such a case would afford not the shadow of extenuation.

M. Mittermaier's instances of "unpunishable drunkenness" will hardly compel general assent to the doctrine based upon them, that the liability to punishment ought to cease altogether when the drunkenness is not intentional. His first is, when the liquor is changed, or intoxicating ingredients are infused, without the knowledge of the drinker ; his second, when a man accustomed to drink a certain quantity with impunity, drinks it in a wine-cellar where liquors are fermenting and becomes intoxicated with the fumes ; his third, when a man knowingly gets drunk, but charges his servant beforehand to lock him up. In such cases, particularly the first, it certainly seems hard to hold the drunkard imputable ; yet, on a close analysis, it will be found that the circumstances under which the offender gets drunk, make little, if any, difference as regards the independent offence. His guilt must still depend on the degree of drunkenness—whether it was or was not such as to deprive him of free-will, reason, understanding, or consciousness. If the man who had been made drunk without his knowledge, were to meet a person against whom he

was known to entertain a grudge and stab him, ought he to be acquitted? If a man who had got drunk with the full knowledge of the maddening effects of liquor upon himself, were to shoot his best friend, ought he to be found guilty? The answer to these questions will shew, that the degree of blame incurred in the process of intoxication is a very bad test for determining the criminality of the acts resulting from it.

H.

To save the trouble of reference, we extract Blackstone's statement of the English doctrine:

"As to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour. A drunkard, says Sir Edward Coke, who is *voluntarius dæmon*, hath no privilege thereby; but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit*. It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, says the president Montesquieu, drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, 'that he who committed a crime, when drunk, should receive a double punishment;' one for the crime itself, and the other for the ebriety which prompted him to commit it. The Roman law, indeed, made great allowances for this vice: '*per vinum delapsis capitalis pæna remittitur*.' But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is (though real), will not suffer any man thus to privilege one crime by another."—vol. iv. pp. 25, 26.

DIGEST OF CASES.

COMMON LAW.

[Comprising 11 Adolphus & Ellis, Parts 3 and 4; 4 Perry & Davison, Part 2; 1 Gale & Davison (in continuation of Perry & Davison), Part 1; 8 Scott, Part 4; 7 Meeson & Welsby, Parts 3 and 4; 8 Meeson & Welsby, Part 1; and 9 Dowling's Practice Cases, Part 4:—all cases included in former Digests being omitted.]

ACCOUNT STATED.

(*Evidence under non assumpsit.*) Under a plea of non assumpsit to a count on an account stated, the defendant may shew that accounts between the plaintiff and himself, the correctness of which he has admitted, were in fact incorrect.—*Thomas v. Hawkes*, 8 M. & W. 140.

ACTION ON THE CASE.

(*For continuing nuisance.*) Action on the case for continuing a nuisance to the plaintiff's market, by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected in October 1838, under the superintendence and direction of the defendants, not on their own land, but on that of the corporation of K. (of which corporation they were members). The Earl of L. was the owner of the market in October 1838, and in February 1839, he demised it to the plaintiff; and the market being afterwards obstructed by the building, this action was brought: Held, that the defendants were liable for continuing the nuisance, although they had no right to enter upon the land to remove it, and that the action was therefore maintainable.—*Thompson v. Gibson*, 7 M. & W. 456.

AFFIDAVIT.

(*Addition of deponent.*) It is now established, that affidavits sworn by any of the parties to a cause are excepted from the operation of rule 5 of H. T. 2 W. 4, and need not contain any addition or degree of the deponents. (2 D. P. C. 469; 2 Bing. N. C. 246; 1 Tyr. 387; 5 M. & W. 163.)—*Shirer v. Walker*, 9 D. P. C. 667.

AMENDMENT.

(*Under 3 & 4 Will. 4, c. 42—Variance.*) Where a variance occurred at the trial of a replevin in the terms of the tenancy laid and proved, and the judge at

nisi prius refused to amend, but directed the jury to find the facts specially, the Court have no power to give judgment according to the justice of the case, if the opposite party may have been prejudiced by the misstatement.

First plea in bar to an avowry for rent arrear, tender of the rent claimed in the avowry; second plea, non tenuit:—Held, that proof of the tender as pleaded did not support the issue on non tenuit without calling in aid the allegations of the first plea, which cannot be done.

If the judge at nisi prius has refused to amend under 3 & 4 Will. 4, c. 42, s. 23, but has directed the facts to be found specially and indorsed on the record, the Court has no power to strike out the indorsement.—*Knight v. M^r Dowall*, 4 P. & D. 168.

APPORTIONMENT OF RENT.

A., in 1836, let certain land to B. under a building agreement; the rent was to commence at Christmas, 1838, and A. to have a right of re-entry in case of non-performance on the part of B. A. availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st of January, 1839. In September, 1838, he had re-let the land to C., at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement: In an action by A. for breaking the first agreement, held, first, that the demise in the ejectment was to be taken as the date of the re-entry by A.; and that he was not entitled to that portion of the rent between the previous Christmas and that day, under the provisions of the stat. 4 & 5 Will. 4, c. 22.

Held, 2, that it was properly left to the jury, as a mere money calculation, to say whether A. had sustained more than nominal damages by the breaking the agreement.—*Oldershaw v. Holt*, 4 P. & D. 307.

APPRENTICE. See *STAMP*, 2.

ARBITRATION.

1. (*Power of arbitrator to certify for costs.*) Where an action of trespass was referred by order of nisi prius, which empowered the arbitrator to amend the pleadings, and to certify for costs, in the same manner as a judge at nisi prius: and the arbitrator awarded a verdict for the plaintiff with nominal damages, and certified in his award that the action was brought to try a right, &c.: Held, that he had power to do so, and that the plaintiff was entitled thereon to his full costs.—*Spain v. Cadell*, 8 M. & W. 129; 9 D. P. C. 745.
2. (*Excess of authority by arbitrator—Award, when only void pro tanto.*) An arbitrator to whom a cause was referred, the costs to abide the event, disposed of each of the issues, and then (although no power was given to him for that purpose,) awarded a stet processus: Held, that although this was an excess of authority, the award was only bad as to that part, and good as to the rest, and the parties might proceed to tax their costs upon it.—*Ward v. Hall*, 9 D. P. C. 610.
3. (*Irregularity in arbitrators' proceedings—Setting aside award.*) The Court refused to set aside an award, on the ground that the arbitrators had improperly received evidence in the defendant's absence, and had been guilty of improper conduct in holding meetings, and conferring with the plaintiff's attorney upon the matters in difference, in the defendant's absence, as it appeared that the defendant was aware of the existence of these irregularities many days before the award was made, but made no objection before the arbitrators, and had notice of the meetings at which the evidence was received, and had been summoned to produce documents at such meetings, but had omitted to attend.—*Bignall v. Gale*, 9 D. P. C. 631.

4. (*Award, when final and certain—Costs.*) A cause and all matters in difference at the time of the order of reference were referred thereby to an arbitrator, who awarded that the defendant should pay to the plaintiffs 184*l.*, for a balance and interest thereon found to be due at the date of the order of reference, "excluding from such account a claim by the plaintiffs for a loss alleged to have been sustained by them to the amount of 32*l.* 19*s.*, on certain varnished hats:" and as to that claim, he found "that no sufficient evidence had been laid before him by the plaintiffs, to shew that at the date of the order of reference, they had sustained any loss on the said hats; and upon that ground he awarded that the plaintiffs were not entitled under the reference to recover anything in respect thereof." Held, that this was a final adjudication of the matters submitted to reference. (1 M. & W. 415.)

The order of reference directed that the costs of the cause should abide the event of the award. The arbitrator decided the suit in favour of the defendant, and ordered the plaintiff, on a day named, to pay him those costs: Held no objection to the award, for that the defendant was not deprived of any right he possessed to recover the costs at an earlier date.—*Cockburn v. Newton*, 9 D. P. C. 674.

ARREST.

1. (*In wrong county, time for objecting to.*) The Court refused, after the lapse of a year, to discharge a party who had been arrested under a ca. sa. in a wrong county, although he swore that he was not aware of that fact until ten months after his arrest, and that he then applied immediately for his discharge to a judge, who refused to interfere.—*Greenshield v. Pritchard*, 8 M. & W. 148.
2. (*Order for capias under 1 & 2 Vict. c. 110, affidavit in support of.*) The affidavit in support of an application for a capias, under the 1 & 2 Vict. c. 110, s. 3, need not state that the deponent has probable cause for believing that the defendant is about to quit England; it is sufficient if the facts stated in the affidavit enable the judge to form that belief.—*Willis v. Snook*, 8 M. & W. 147.
3. (*Recaption of party discharged on ground of privilege—Concurrent writs.*) A party arrested under a ca. sa., and discharged on the ground of privilege, may be retaken under the same writ when his privilege expires.

Where a party, against whom there are several writs of ca. sa. in the sheriff's office, is taken under one of them in execution of a judgment not duly revived by scire facias, the arrest, not being illegal from any wrongful act on the part of the sheriff, enures as a good arrest under all the other writs. (9 Bing. 566; 5 M. & W. 149; 5 Bing. N. C. 489; 10 Ad. & E. 570; 2 W. Bl. 823.)—*Reynolds v. Newton*, 1 G. & D. 153.

ATTORNEY.

1. (*Taxation of bill.*) Where, in an attorney's bill of costs, several items, not for fixed fees but of a discretionary nature, had no charges set opposite to them, and others were charged, some too low and some too high; and the master, on taxation, reduced the latter to the proper scale, but declined to increase the former, or to insert the charges omitted altogether; the Court refused to review the taxation.—*Eyre v. Shelley*, 8 M. & W. 154.
2. (*Examination.*) Under special circumstances, the Court allowed an articulated clerk to be examined while under age.—*Ex parte Boutfield*, 9 D. P. C. 616.
3. (*Bill, when taxable.*) An attorney's bill of costs for business done on behalf of the assignees of a bankrupt, in prosecuting the fiat before county commissioners,

appointed under the 1 & 2 Will. 4, c. 56, is not taxable, and need not therefore be delivered a month before action brought.—*Harper v. Williams*, 9 D. P. C. 618.

4. (*Costs of taxation.*) On the taxation of a bill of costs as between attorney and client, in a cause in the Court of Common Pleas, it appeared that charges were made for business done and disbursements made during a period when the attorney, although an attorney of the Queen's Bench, was not qualified to practise in the Common Pleas, and before the stat. 1 Vict. c. 56, and those charges were struck out: Held, that the master was right in making such reduction, and that, the amount of the bill being thereby reduced by more than one-sixth, the attorney was liable to pay the costs of the taxation. (2 C. M. & R. 178.)—*Newton v. Harland*, 9 D. P. C. 641.
5. (*Re-admission—Notices.*) On an application for the re-admission of an attorney, the Court will not dispense with the notice required to be stuck up in the chief justice's office. So, where the notice had been stuck up five days before the commencement of term, and the application was made on the first day of term, the Court refused to grant the rule.—*In re Tucker*, 9 D. P. C. 661.

BAILMENT. See LIEN.

BANKRUPTCY.

1. (*Guarantee to induce creditor to sign certificate, void—Pleading—General issue by statute.*) The statute 6 Geo. 4, c. 16, s. 125, rendere void a guarantee given by a third person to a creditor, as an inducement to sign a bankruptcy certificate. (2 Doug. 694 a., n. 3; 3 C. & P. 379.) And in an action on the guarantee, such defence is admissible under a plea of the general issue "by statute," under the same section.—*Hankey v. Cobb*, 1 G. & D. 47.
2. (*Order and disposition—Deposit by bankrupt of policy of assurance.*) Assignees of a bankrupt cannot recover in trover a policy of insurance on life, effected by the bankrupt, and deposited by him, before his bankruptcy, with the defendants, as a security for money then and previously advanced by them to him,
 An instrument so deposited is not in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the statute 6 Geo. 4, c. 16, s. 72. (2 T. R. 491.)—*Gibson v. Overbury*, 7 M. & W. 555.

See ATTORNEY, 3; SPECIAL CASE.

BASTARD.

- (*What evidence sufficient to illegitimize the child of a married woman.*) A woman who was married in 1812, in 1818, her husband being alive, went through the form of marriage with another man, with whom she cohabited till 1832: Held, that the Quarter Sessions, in 1840 (the husband being still alive) were not justified in finding, upon these facts alone, and without any evidence of the non-access of the husband, that her child, born in 1821, was illegitimate.—*Reg. v. Inhabitants of Mansfield*, 1 G. & D. 7.

And see ORDER OF FILLATION.

BILLS AND NOTES.

1. (*Pleading—Indorsement to party as agent for another.*) To a declaration against the acceptor of a bill of exchange indorsed by the drawer to the plaintiff, the defendant pleaded that he accepted it on account of a debt due from him to the drawer, that the drawer indorsed it in blank and delivered it to the plaintiff as agent for R., for the purpose that the plaintiff should deliver it to R. in payment of a debt due from the drawer to R.; that the plaintiff gave no considera-

tion for it, and wrongfully retained it, in breach of his duty as R.'s agent, that R. claimed to be entitled, and dissented from the plaintiff's suing: Held, on motion for judgment non obstante veredicto, that the plea amounted to a constructive denial of the alleged indorsement to the plaintiff, and was therefore good after verdict.—*Adams v. Jones*, 4 P. & D. 174.

2. (*Promissory note, what is—Guarantee—Consideration.*) An instrument was in the following terms:—"I undertake to pay to R. I. the sum of 6l. 4s. for a suit of, ordered by D. P.:" Held, that it was not a promissory note, but good as a guarantee, as the consideration could be collected by necessary inference from the instrument itself.—*Jarvis v. Wilkins*, 7 M. & W. 410.
3. (*Notice of dishonour.*) A bill of exchange having been drawn upon A. B., was accepted by him, and was afterwards indorsed by the drawer to the plaintiffs, who indorsed it to the Birmingham and Midland Counties' Bank, who indorsed it to one W. The bill having been dishonoured when due, W. gave notice of it to the bank, who gave notice to the plaintiffs, one of whom wrote the following letter to the drawer:—"Dear Sir, To my surprise I have received an intimation from the Birmingham and Midland Counties' Bank, that your draft on A. B. is dishonoured, and I have requested them to proceed on the same:" Held, that if there was more than one bill to which the letter could apply, it lay upon the defendant to prove that fact, in order to show its uncertainty.

Held, also, that the letter was a good notice of dishonour.—*Shelton v. Braithwaite*, 7 M. & W. 436.

4. (*Same.*) In an action by the indorsee against the drawer of a bill of exchange, it is enough for the plaintiff to show, to the satisfaction of the jury, that the letter containing the notice of dishonour was posted in such time as that, by the due and usual course of the post, it would be delivered on the proper day.

The post-office mark is not conclusive of the time when the letter is posted.—*Stocken v. Collin*, 7 M. & W. 515.

5. (*Action on banker's cheque—Consideration—Pleading.*) Assumpsit by the holders against the drawer of a banker's cheque. Plea, that the defendant made the draft for the accommodation of C., and that there never was any consideration for it; and further, that there never was any consideration for the transfer of the same by C. to the plaintiffs, and that they always held and now hold the same without value. Replication, *de injuriâ*. At the trial, it appeared that the plaintiffs were trustees of the London and Westminster Bank, and that they employed one R. as their agent to manage one branch of the concern. C., in whose favour the bill was drawn, had an account with that branch, which was considerably overdrawn. It was the practice of the bank to send round an inspector to all their branch banks once every quarter, to examine their agents' accounts; and in order to prevent its being discovered that C. was in debt to the bank, R. was in the habit of taking cheques from C. before the quarter day approached, which he placed to his credit on the account, but upon an express understanding that they were not to be presented, but returned to C. after the quarter day was past. The cheque in question had been obtained from the defendant for this purpose by C., R. being aware of it, in consideration of a counter cheque from C. for the same amount: Held, that neither of the averments in the plea was sustained by the evidence, and that the plaintiffs were entitled to recover.—*Rosanquet v. Corser*, 8 M. & W. 142.

6. (*Title by indorsement—Pleading.*) In an action on a bill of exchange, alleged

in the declaration to have been indorsed by M. to the plaintiff; the defendant pleaded, that the bill was drawn and accepted without value, and that there never was any consideration for indorsing the bill by any of the parties, nor for the indorsement by M., nor for M. paying the amount. Replication, that the indorsement by M. was in blank, and that R., who appeared to be, and whom plaintiff believed to be, the lawful holder, of the bill, indorsed it to the plaintiff for value, to wit, &c. Special demurrer, for want of a statement of consideration for the drawing and accepting of the bill, and for departure, as to the allegation of the indorsement to the plaintiff: Held, that the replication was good, as the plaintiff, against whom there was no allegation of fraud, sufficiently established his own title by alleging an indorsement to him for value by a person whom he believed to be the lawful holder of the bill.—*Ashbourn v. Anderson*, 9 D. P. C. 595.

BOND.

1. (*Assignment of—Operation of 13 Eliz. c. 5—Right of action on.*) A bond is not "goods" or "chattels" within 13 Eliz. c. 5, as to fraudulent alienations.

Where a party, after assigning an annuity bond to trustees for his wife and children, and in the event of the children dying without issue, in trust for himself, his executors, &c., became insolvent: Held, the contingency in favour of the insolvent not having happened, that his assignees, under 1 Geo. 4, c. 119, had no beneficial interest in the bond, nor, consequently, any right of action on it.—*Sims v. Thomas*, 4 P. & D. 233.

2. (*Alteration in—Pleading.*) Debt on bond. Plea, that after its execution a material addition was made to the condition thereof: Held bad, for not stating that the addition was made in writing to the condition itself.—*Harden v. Clifton*, 1 G. & D. 22.

And see STAMP, 3.

BOROUGH SESSIONS. See MUNICIPAL CORPORATIONS ACT, 5.

BRISTOL DOCK ACT. See POOR RATE, 1.

CEMETERY. See POOR RATE, 1.

CERTIORARI.

(*On removal of indictment—Liability of bail to costs.*) The bail taken on the removal of an indictment into the Court of Queen's Bench, under the 5 W. & M. c. 11, s. 2, are liable to pay the prosecutor's costs, although there is no undertaking to that effect in their recognizances. (13 East, 4; 7 D. P. C. 680.)—*Reg. v. Hawdon*, 1 G. & D. 135.

And see ORDER OF JUSTICES.

CHURCH RATE.

1. (*Jurisdiction of Ecclesiastical Courts with relation to.*) A cause for subtraction of church rates is within the exceptive part of 23 Hen. 8, c. 9, and may be referred by letters of request to the Court of Arches, and the defendant may be cited out of his diocese.—*Jolly v. Baines*, 4 P. & D. 224.
2. In a parish in which there are several churchwardens, each usually acting for a separate district, one churchwarden may lay a complaint, under the 53 Geo. 3, c. 127, s. 7, against a resident in his district, for nonpayment of church rate.—*Reg. v. Fenton*, 1 G. & D. 17.

CHURCHWARDENS.

(*Ownership of parish land by.*) Although a parish forms part of a union, under 4 & 5 Will. 4, c. 76, the parish land is not divested out of the churchwardens and overseers, so as to disable them from bringing ejectment, either by sect. 21 of that act, or by 5 & 6 Will. 4, c. 69, s. 3. (10 B. & C. 686; 1 P. & D. 493.) *Doe d. Norton v. Webster*, 4 P. & D. 270.

COGNOVIT.

A consent to a judge's order for judgment and execution, is not within the 9th section of the 1 & 2 Vict. c. 110, and the order is therefore valid, although neither the defendant nor his attorney attended before the judge.—*Braine v. Munson*, 9 D. P. C. 748.

CONSTABLE. See **COSTS**, 3.

CONTRACT OF SALE.

(*Time, when of the essence of the contract—Rescission of contract.*) On a contract for the sale of a specific chattel on credit, time is not, without express stipulation to that effect, of the essence of the contract; and the vendee, on tender of the price, although after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on nonpayment at the day. (6 B. & C. 360; 4 B. & C. 941; 5 B. & Adol. 313.)—*Martindale v. Smith*, 1 G. & D. 1.

COPYHOLD.

1. (*Evidence of title of surrenderee.*) In ejectment for copyholds, the court rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his admittance, are evidence of his title against the alleged surrenderor. (16 East, 208; 6 B. & C. 484; 1 N. & M. 424.)—*Doe d. Garrod v. Olley*, 4 P. & D. 275.
2. (*Ejectment on lease by copyholder.*) Lessee for years of a copyholder may maintain ejectment, although there be no custom in the manor to lease, and no licence has been obtained from the lord; such lease being good between the parties to it, and void only as against the lord. (Owen, 17 Cro. Eliz. 535; *Ibid.* 395, 469, 498, 717; 2 Brownl. 40.)—*Doe d. Tressidder v. Tressidder*, 1 G. & D. 70.

COSTS.

1. (*Security for.*) The plaintiff, before action brought, had assigned his property to trustees, in trust for the benefit of his creditors, and had also become both insolvent and bankrupt. The trustees brought an action in his name: Held, that the defendant was entitled to security for costs. (2 B. & C. 579; 2 D. P. C. 596.)—*Elliott v. Kendrick*, 4 P. & D. 306.
2. (*Treble costs.*) A mandamus was directed to a commissioner under a drainage act, 36 Geo. 3, c. 99, commanding him to swear into office a person claiming to have been appointed such commissioner. He returned that the claimant was not duly appointed; and upon issue joined in a traverse of such return, the defendant had judgment. By the 52nd section of the act, if judgment is given against the plaintiff in any action, suit, or information commenced or prosecuted against any person for any thing done in pursuance of the act, the defendant is to have treble costs: Held, that the judgment for the defendant in the proceeding by mandamus did not entitle him to treble costs, since neither his refusal to

swear in the claimant, nor the making of the return to the writ, was a thing done in pursuance of the act.—*Reg. v. Kelk*, 1 G. & D. 127.

3. (*Double costs to constable.*) Where a constable, appointed under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 76, is sued for an act done in the exercise of his general duty as a constable, and the plaintiff discontinues, the defendant is entitled to double costs under the 21 Jac. 1, c. 12, s. 5, and not merely to costs as between attorney and client, under the 5 & 6 Will. 4, c. 76, s. 133.—*Maberley v. Titterton*, 7 M. & W. 540.
4. (*Operation of 3 & 4 Vict. c. 24, s. 2.*) Where, at the assizes, the jury found a verdict for 1s. in an action on the case, the last cause in the list, and the judge forthwith adjourned the Court to his lodgings, whither the plaintiff's counsel followed him, and there (within a quarter of an hour after the delivery of the verdict) applied for and obtained a certificate under the 3 & 4 Vict. c. 24, s. 2, it was held that this certificate was well granted. For the words of the statute, "shall immediately after certify," &c. mean that the judge shall certify with convenient speed, and on the facts as they appeared at the trial, without being influenced by any extraneous facts afterwards presented to his mind. (9 D. P. C. 76, 220.)—*Thompson v. Gibson*, 9 D. P. C. 717.
5. (*Directions to taxing officers—Costs of declaration on bill of exchange.*) The directions to taxing officers, authorizing them to allow 1l. 18s. for declaration, &c. on a bill of exchange, do not apply where more than one action is brought on the same bill: in such case the declarations must be taxed according to their length.—*Phipps v. Field*, 9 D. P. C. 738.
6. (*On new assignment.*) To trespass qu. cl. fr. the defendant pleaded the general issue, and also special pleas of prescriptive rights. The plaintiff denied these rights, and new assigned excess. The defendant paid money into Court on the new assignment, which the plaintiff accepted in satisfaction, and entered a nolle prosequi as to the other causes of action: Held, that the defendant was not entitled to the general costs of the cause. (1 Saund. 300 a; 1 M. & W. 731.)—*Benn v. Bateman*, 9 D. P. C. 743.

And see ARBITRATION, 1.

COVENANT.

- (*By under lessee for repair, liability on.*) A. leased premises to B. from the 25th March, 1823, for sixteen years wanting ten days, and B. covenanted with A. to keep the premises in repair, and to paint once in every five years of the term, and to leave the premises in repair. B. underleased the premises to C. from the 24th July, 1834, for four years and three quarters wanting eleven days, and covenanted with B. to keep the premises in repair, (the covenant being in the same terms as in the original lease), and to paint once during the term, and to leave the premises in repair. A. sued B. for breaches of his covenant, and B. let judgment go by default; and upon the writ of inquiry the damages were assessed at 64l. 10s., being the amount of dilapidations proved by a surveyor, whose estimate had been laid before B. previous to the commencement of the action. B. afterwards sued C. for the amount of dilapidations, and the costs of the action brought against him. The jury found the amount of the dilapidations to be 57l. 10s.: Held, that B. was not entitled to recover also the amount of the costs in the former action. (3 B. & C. 533.)—*Penley v. Watts*, 7 M. & W. 601.

And see LANDLORD AND TENANT, 2.

CRIMINAL INFORMATION.

One of several applicants for a criminal information against the publisher of a newspaper, addressed to the editor an improper and recriminating letter, bearing date the 26th December, signed by him "for self and fellows," which was published in another newspaper of the 5th January following. It appeared that a copy of this letter had been sent to each of the other applicants; and their affidavits not stating when they received such copy, nor that they did not know of the letter before its publication, the Court discharged the rule.—*Reg. v. Lawson*, 1 G. & D. 15.

DEANERY OF EXETER.

(*Right of appointment to.*) The deanery of Exeter was founded and endowed by the bishop of that see in 1225; the dean to be elected freely by the chapter from among the prebendaries. For more than 300 years from the foundation, the course pursued at the election of dean was for the bishop to issue his license to the chapter to elect, for the chapter to elect and present to the bishop, and for the bishop to confirm. Queen Elizabeth issued letters recommendatory, on a vacancy occurring in 1559, and the person recommended by her was elected by the chapter, and all the formalities of previous elections were observed. Charles 2, and succeeding monarchs down to 1839, granted the deanery as it became vacant by letters patent and as of full right, but the same formalities were always observed, the bishop issuing his license, the chapter electing, and then the bishop confirming.

In 1839 the crown issued letters patent granting the deanery, to which the chapter paid no attention. The crown afterwards issued letters recommendatory in favour of the same person who was grantee under the letters patent, but the chapter elected another person.

A rule for a mandamus to elect the person recommended by the crown was discharged, on the grounds, that the crown had not the right, which it appeared to claim, of recommending a person whom the chapter would be bound to elect, so that the election of any other would be void; and that, on the other hand, if the deanery were donative in the crown, it would pass by letters patent, and the person elected by the chapter be a mere trespasser; that if it were in the presentation of the crown as patron, or the crown had a right to nominate a person to the chapter to be by them presented to the bishop for institution, the proper remedy was *quare impedit*.—*Reg. v. President and Chapter of Exeter*, 4 P. & D. 252.

DEBTOR AND CREDITOR.

(*Effect of release of debt on securities held by the creditor.*) By the release of a debt, by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore, the relinquishment of such security, for the benefit of the debtor, forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed.—*Cowper v. Green*, 7 M. & W. 633.

DEVISE.

1. (*Ambiguity in description of devisee—Parol evidence.*) On a devise to M. B., widow, for life, and her three daughters, Mary, Elizabeth, and Ann, in fee, an illegitimate daughter, named Elizabeth, claimed as being the only Elizabeth answering the description at the time of the will being made, a legitimate

daughter Elizabeth having been dead six years previously: Held, that parol evidence was admissible to show that the testator intended his legitimate daughter as devisee, and that he did not know of her death.—*Doe d. Thomas v. Beynon*, 4 P. & D. 193.

2. (*Ambiguity in description of devisee—Parol evidence.*) Devise to J. A., the grandson of my brother, in fee, charged with 100*l.* to each and every of the brothers and sisters of J. A.

After it had been shown that the brother of the testatrix had two grandsons named J. A., the one with several brothers and sisters, and the other with only two brothers and one sister, held that evidence was admissible of a declaration by the testatrix, some months after making her will, that she had devised the property in question to the J. A. who had only two brothers and sisters. (2 M. & W. 129; 5 M. & W. 363.)—*Doe d. Allen v. Allen*, 4 P. & D. 220.

3. (*To trustees, when it gives a fee.*) Devise of all the testator's estate, right, title, &c. therein, to trustees, their heirs and assigns for ever, upon trust and to the intent that A. should hold to him and his assigns for life, subject to the payment of an annuity, and to the further intent that he should cut as much timber as should be necessary for the use of the farm: and after A.'s death, then to the use and behoof of the trustees "and their assigns, in trust, and I give the same unto B. and his heirs and assigns for ever, and for want of issue, to the use and behoof of my trustees and their assigns, in trust to preserve the uses, &c. from being defeated: and for want of such issue, to C., his heirs and assigns for ever: and furthermore, upon this trust, and to the further intent, that my trustees, their heirs or assigns, by mortgage or demise of my real estate, or from the rents, or by such other ways as they shall think fit, raise 80*l.* for payment of my debts." Held, that the trustees took the legal estate in fee. (4 Ad. & E. 582; 7 Ad. & E. 636.)—*Doe d. Davies v. Davies*, 1 G. & D. 33.

4. (*Of fee by implication.*) A testator, after directing that all his debts and funeral expenses should be paid by his executors thereafter named, devised to A. a particular farm, without words of limitation, and other farms to B., C., and D., respectively, in the same terms; and appointed A. and B. joint executors and residuary legatees of his will: Held, that A. took a life estate only in the farm devised to her.—*Doe d. Roberts v. Roberts*, 7 M. & W. 382.

5. (*Several inheritances.*) A testator devised his real estates at B., after the decease of his wife, to J. B., "but at his death the whole to be for J. B.'s wife and children, and which children, at the death of their mother, should inherit the same jointly during their lives; and if the said children should die before they arrived at the age of twenty-one, the testator willed that the estates should go to H. S., and to the use and benefit of him and his children." J. B. and his wife had five children, one of whom died in the lifetime of the testator, another died after his death under twenty-one, and a third attained twenty-one, and died unmarried and intestate. The two surviving children, after the death of the testator's widow, and of their parents, executed a disposition under the 3 & 4 Will. 4, c. 74, for barring all remainders in the estates of B.: Held, that these two children took an estate in fee-simple, as tenants in common, in the estates in question. (4 M. & W. 229.)—*Spry v. Bromfield*, 7 M. & W. 545.

DISTRESS.

1. (*Action for excessive distress, when maintainable.*) An action on the case lies for

distraining for more rent than is due, although the distress taken is not sufficient to pay the rent due.

Such an action lies, although a notice of distress for more rent than is due is withdrawn, and the distress is sold under a second notice of distress for the rent really due. (*Overruling Avenell v. Croker*, 1 Moo. & M. 172, and *Wilkinson v. Terry*, 1 M. & Rob. 377.)—*Taylor v. Henniker*, 4 P. & D. 242.

2. (*What goods privileged from.*) Brewer's casks sent to a public-house with beer, and left there until the beer is consumed, are liable to be distrained for the rent of the house. (3 M. & W. 677.)—*Joule v. Jackson*, 7 M. & W. 460.

DRAINAGE ACT.

A local drainage act directed that the Commissioners should be elected by the proprietors of the lands within the parish: *Quere*, whether by the term "proprietors" was meant those who had the actual control of the lands, or the strict owners in fee.

Where under a local act a proxy to vote may be appointed by writing, the writing must be stamped.—*Reg. v. Kelk*, 4 P. & D. 185.

ECCLESIASTICAL COURT.

- (*Jurisdiction of, as to probate—Irish probate—Pleading.*) To a declaration in debt on indenture, by an administrator, who made proffer of letters granted by the Archbishop of Canterbury, the defendant pleaded, that at the time of the intestate's death the indenture was "without the province of Canterbury, to wit, at Dublin, in the kingdom of Ireland, and was not then in the diocese of Canterbury, but was of the notable goods of the deceased, to be administered within the kingdom of Ireland:" Held, a sufficient defence, although the plea did not deny that any Irish administration had been obtained, and did not shew by what jurisdiction in Ireland the indenture ought to have been administered, and that the Court would take notice that by the words *Kingdom of Ireland* were intended that part of the United Kingdom of Great Britain and Ireland called Ireland.—*Whyte v. Ross*, 4 P. & D. 199.

EJECTMENT.

1. (*Service.*) Service of a declaration was effected by passing the copy of the declaration and notice under the door of the dwelling-house, the party being in the house at the time, and refusing to open the door, or listen to the explanation given of the object and nature of the service: Held sufficient.—*Doe d. Lowndes v. Roe*, 7 M. & W. 439.
2. (*Statement of date of demise—Amendment.*) A declaration in ejectment laid the demise on the 31st of October (without mentioning any year). At the trial, the lessor of the plaintiff proved a title in himself on the 31st of October, 1840: Held, first, that this was not a variance between the declaration and the proof, so as to empower the judge at the trial to amend the declaration under the stat. 3 & 4 Will. 4, c. 42, s. 23, by inserting the year: secondly, that the omission was no ground of nonsuit.

Semble, that the defendant's proper course, in such case, is to apply to the Court to compel the plaintiff to insert the correct date.—*Doe d. Parsons v. Heather*, 8 M. & W. 158.

3. (*Service—Appearance.*) Where a party was served as tenant in possession, and he swore that he was underlessee of the premises, the Court refused to set aside an appearance entered by him, on a suggestion by the lessor of the plaintiff that the party had no interest in the premises.—*Doe d. Turner v. Gee*, 9 D. P. C. 612.

4. (*Service.*) The notice at the foot of the declaration required an appearance in Michaelmas term, but service could not be effected in time to move in that term. The Court, in Hilary term, granted a rule for judgment against the casual ejector, unless cause were shewn before the last day but one of that term. (2 D. P. C. 348.)—*Doe d. Earl of Warwick v. Roe*, 9 D. P. C. 714.

And see **FINE**.

ESCAPE.

- (*Pleading—Evidence.*) To an action against the marshal for an escape, he pleaded that, after the escape of the prisoner, and before the defendant had notice thereof, and before the commencement of the suit, he voluntarily and of his own accord returned again into the defendant's custody, and that the defendant did thereupon keep and detain, and always from hence hitherto hath kept and detained, and before and at the commencement of this suit kept and detained, and still doth keep and detain the said prisoner in his custody as such marshal, in execution at the suit of the plaintiff: Held, that under this plea, evidence of a return into custody since the commencement of the suit was not admissible.—*Davis v. Chapman*, 9 D. P. C. 645.

EVIDENCE.

1. (*Proof of old writings.*) Letters more than thirty years old, produced from the proper custody, prove themselves.

The defendant produced letters thirty years old, purporting to be addressed to her mother, and proved that she was living with her mother at the time of her death, when her papers and keys were given up to her; Held, that the custody was proper.—*Doe d. Thomas v. Beynon*, 4 P. & D. 193.

2. (*Parol evidence to explain deed.*) Where a deed purported to convey a messuage with the appurtenances, purchased at an auction, it was held that neither the conditions of sale at the auction, signed by the purchaser, nor his own declarations as to the extent of his purchase, were admissible in evidence, to shew that a garden which had been usually enjoyed with the messuages was expressly excepted from the sale. (2 Saund. 401; 1 Bos. & P. 53; 4 Ad. & E. 76.)—*Doe d. Norton v. Webster*, 4 P. & D. 270.

3. (*To explain mercantile contract.*) Where a sold note expressed "18 pockets of hops at 100s.," held that parol evidence was admissible to shew that the 100s. meant the price per cwt. (3 Campb. 426.)—*Spicer v. Cooper*, 1 G. & D. 52.

4. (*Comparison of handwriting.*) Where a witness, called to prove the signature of the attesting witness to a bond, swore that the signature was not in the supposed attesting witness's handwriting, another paper (not in evidence in the cause) was put into his hand, which he also stated was not that person's writing: Held, that the plaintiff was not at liberty to prove, for the purpose of contradicting the witness in the box, that this paper was actually written by the attesting witness to the bond. (11 Ad. & E. 322.)—*Hughes v. Rogers*, 8 M. & W. 123.

And see **DEVISE**, 1, 2.

EXECUTION.

1. (*Return to fi. fa.*) It is a sufficient return to a writ of fi. fa., that the sheriff seized the goods of the defendant by virtue of several previous writs of fi. fa., "according to their priority."

The sheriff must state some amount as the value of the goods seized, but the omission to do so is an irregularity only; and therefore where a return,

so defective, was made on the 6th March, it was held too late, on the 24th April, to object to the return on that ground.—*Chambers v. Coleman*, 9 D. P. C. 588.

2. (*Effect of avoidance of writ by rule of Court—Pleading—Order under 1 & 2 Vict. c. 110, s. 18—Ruling sheriff to return writ—Estoppel.*) Trespass for breaking and entering plaintiff's house, and seizing his goods. Plea, that an action was brought by the defendant against the plaintiff, which was referred to arbitration, and that the arbitrator awarded a certain sum to be due to the defendant, and ordered the plaintiff to pay it on a certain day, which the plaintiff having refused to do, the defendant issued a writ of *fi. fa.*, and by virtue thereof levied on the plaintiff's goods. Replication, that by a rule of Court the said writ was ordered to be set aside for irregularity. Rejoinder, by way of estoppel, that after the making of the rule of Court, the plaintiff ruled the sheriff to return the writ: Held, on special demurrer to the rejoinder: 1. That the replication was sufficient, without averring that the rule of Court was acted on: 2. That the rejoinder was bad, for that the ruling the sheriff to return the writ did not estop the plaintiff from shewing that it was not a good writ, nor did the filing of the record affirm the existence of a void writ.

The stat. 1 & 2 Vict. c. 110, s. 8, does not authorize a party to issue execution for money ordered to be paid by an award, made under an order of reference which has been made a rule of Court. (11 Ad. & E. 175.) But execution may issue for costs when ascertained by the taxing officer, and it is not necessary that there should be an order after the taxation.—*Jones v. Williams*, 9 D. P. C. 702.

FACULTY. See PROHIBITION, 2.

FINE.

(*Disseisin by—Entry to avoid—Husband and Wife—Entry of verdict in ejectment.*)

Testator, in 1804, devised his real property to his brother-in-law, W. P., but at that time had no interest in the land in question.

In 1814 he purchased the land, on which occasion the residue of an outstanding term of 500 years, created in 1793, was assigned to W. P., in trust for the testator, to attend the inheritance. The testator died in 1820, when the fee simple descended, as to one moiety, to the testator's four nieces, and, as to the other, to his sister, the wife of W. P.

W. P. and his wife shortly afterwards entered into possession of the whole of the premises, and received the rents, without accounting to the other co-parceners; and in 1823 W. P. and his wife executed a feoffment, with livery of seisin, and afterwards a fine sur cognisance de droit come ceo was levied with proclamations, in which the feoffee was plaintiff and the feoffors defendants. At the time of the testator's death and of the fine, his nieces were under coverture. W. P. died in 1828, having continued in sole possession. By his will he devised to the defendant, but made no mention therein of the term. The defendant entered, and continued in possession to the time of the ejectment brought against him in 1838. In 1837 the wife of W. P. died, and in the same year administration de bonis non of W. P. was granted to S. B., the husband of one of the coparceners.

In 1836 one of the coparceners died, leaving her husband her surviving, and in 1837 the husband of another coparcener died.

The declaration in ejectment contained a count on a joint demise by the widow coparcener, the husband of the coparcener deceased, and the other two coparceners and their husbands; and also a count on a demise by S. B., the administrator de bonis non of W. P.

Just before ejectment brought, S. B. made an actual entry on the premises, demanding them on behalf of himself and the other lessors of the plaintiff in the first count, and stating that he entered to avoid all fines.

Held, that by the feoffment and fine with proclamations there had been an absolute disseisin of the coparceners, and not a disseisin at election, and that an entry within five years was necessary to avoid the fine.

That the entry was too late as to the two husbands, and being too late as to them, was too late as to their wives, the coparceners also, during coverture, although they would have five years to enter after discovery.

That the joint demise being therefore bad as to the husbands, it could not be supported as to the other parties.

That the fine and feoffment of the termor had caused a forfeiture of the term, and entitled the freeholder to enter within five years.

That the freeholder might, however, waive the forfeiture, and enter within five years after the expiration of the term.

That as the freeholder might waive the forfeiture of the term, he might treat it as still subsisting for another purpose, and acquire it for his own benefit.

That therefore S. B., who had acquired the term as administrator de bonis non of the termor, might set it up for his own benefit, and that the count on his single demise was good.

That though the lessors of the plaintiff were beneficially entitled to a moiety only of the land, the verdict must, in point of form, be entered for the whole, as the term could not be divided.—*Doe d. Blight v. Pett*, 11 Ad. & E. 842; 4 P. & D. 278.

GOODS SOLD AND DELIVERED.

(*Effect of return of goods—Particulars of demand.*) The particulars of the plaintiff's demand stated the action to be brought to recover the sum of 294. 1s. 1d., after giving credit for the sum of 928l. 9s. 11d., paid at different times. It appeared that the plaintiff had sold and delivered, in the whole, goods to the amount of 949l. 10s., but that part of them, to the amount of 84l. 18s., had been returned to the plaintiff: Held, that this return did not extinguish ab initio the demand for the goods returned, and that the plaintiff was therefore entitled to recover for the balance above the amount for which credit was given.—*Lamb v. Michelwanto*, 1 G. & D. 136.

GUARANTEE. See **BANKRUPTCY**, I.

HIGHWAY ACT. See **JUSTICES OF THE PEACE**, I.

HORSE RACE. See **WAGER**.

HUSBAND AND WIFE. See **FINE**.

INFERIOR COURT.

(*Removal of Causes from—Small Debts Act.*) By a local act of parliament, 2 & 3 Vict. c. ciii., a Court was established for the recovery of debts not exceeding 15l.; and it enacted that "no plaint entered in the Court, nor any order, judgment, or proceeding therein, should be removed into any superior Court by any writ or process whatsoever, except by leave of one of the judges of the superior Courts at Westminster; with a proviso, that the provisions contained in the act for abolishing arrest on mesne process, for the removal of judgments of inferior Courts into the Courts at Westminster, for the purpose of issuing execution on them, should be applicable to this Court: Held, that, under that section, after

judgment had been obtained in the inferior Court, the proceedings could be removed only for the purpose of issuing execution.—*Fox v. Feale*, 8 M. & W. 126.

INSOLVENT.

1. (*Vesting of Estate in Assignee.*) An insolvent having been committed to prison on the 15th July, 1837, for a debt under 20*l.*, was discharged from custody by the Court on the 2d November (the first day after Michaelmas term). On the 1st October, 1838, the Imprisonment for Debt Act (1 & 2 Vict. c. 110) had come into operation, and on the 23d October a creditor petitioned the Insolvent Court for a vesting order under the provisions of that act; on the 26th that Court made an order, vesting the insolvent's estate in a provisional assignee; and on the 24th November (after the insolvent's discharge) a second order was made vesting the estate in the petitioning creditor: Held, that notwithstanding the discharge of the insolvent, his estate had become vested in his assignee.—*Kitching v. Croft*, 4 P. & D. 339.
2. (*Effect of discharge.*) The defendant, in a mortgage to the plaintiff, covenanted to insure his life, and to pay the annual premiums on the policy, and in case of default, that he would repay such sums as should be paid by the plaintiff by way of premiums. The defendant insured his life, and was afterwards discharged under the Insolvent Act: Held, that the defendant was still liable on the covenant for premiums paid by the plaintiff after the defendant's discharge. (2 Bing. N. C. 168.)—*Bennett v. Burton*, 4 P. & D. 313.

And see *BOND*, 1.

INTERPLEADER ACT.

1. (*Equitable Claim.*) The sheriff having taken in execution goods which the defendant, who was one of the administrators of an intestate person, had become possessed of under a sale from his co-administrator, was served with a notice from another party, that he and others were also entitled to shares in the goods, as next of kin to the intestate, and that, upon a bill filed by them in the Court of Chancery, the defendant had been restrained by injunction from selling, mortgaging, or disposing of the goods, and that they should hold the sheriff answerable for all loss and damage occasioned by the seizure: Held, that this was not such a claim as entitled the sheriff to apply for relief under the Interpleader Act.
Quære, whether the Court will grant such relief in any case where the claim is of a merely equitable nature? (1 D. P. C. 505.)—*Roach v. Wright*, 8 M. & W. 155.
2. (*Costs.*) Where an issue has been directed under the Interpleader Act, to try the right of property in a bill of exchange, the successful party is entitled to the amount of the bill, and all costs, out of the fund in Court, so as completely to indemnify himself. (2 D. P. C. 730.)—*Jones v. Regan*, 9 D. P. C. 580.
3. (*Same.*) A feigned issue having been directed under the act, to be tried in respect of five horses seized under a *fi. fa.* at the suit of L. against H., in which L. was defendant, and T., the claimant, was plaintiff, the jury found that T. was entitled to two of the horses, and L. to the other three. The Court ordered that the master should enquire into the amount of costs incurred by each party with regard to his respective claim, and balance the one against the other, and that the party in whose favour the balance appeared should be entitled to the amount of it against the other party; and that L., the defendant in the issue, should pay the costs of the original application to the Court for the issue.—*Lewis v. Holding*, 9 D. P. C. 652.

JOINT STOCK BANKING COMPANY.

(*Scire facias* against—*Pleadings*—*Verification*.) The plaintiff obtained a judgment in an action against a public officer, under the provisions of the 7 Geo. 4, c. 46, and subsequently sued out a writ of *sci. fa.* against fifteen persons, whom he charged as members of the corporation of which the original defendant was the representative public officer. The sheriff returned as to all the defendants, that they had nothing, and were not to be found in his bailiwick; twelve of the defendants voluntarily appeared, and the plaintiffs declared against them upon demurrer, assigning for cause, that it did not appear that the then defendants, who had not come forward, were included in the proceedings, it was held, that such objection could only be an irregularity, to be taken advantage of on motion under the statute 4 Anne, c. 16, and not upon demurrer; that the objection of non-joinder could not be raised upon demurrer, because there was nothing on the face of the record to shew that the defendants in question were alive, and that the writ could not therefore be abated on the ground of non-joinder; and also that by the terms of the statute 7 Geo. 4, c. 46, such persons as are sued, being members of the co-partnership, have their remedy for contribution against the other members of the corporation, though not joined with them in the declaration in *scire facias*. A plea in abatement for non-joinder for other members would be bad, and a demurrer to the declaration for the same cause, therefore, could not be sustained.

The plaintiffs declared in *scire facias*, reciting a judgment recovered against one W. M., one of the public registered public officers, for the time being, of the Imperial Bank of England, under the statute 7 Geo. 4, c. 46, and prayed judgment against certain members of the co-partnership, carrying on the business of the bank: Plea, that at the time of the recovery of the judgment against W. M., the said W. M. was not one of the public officers of the said corporation; conclusion to the country: Held, on demurrer, that the plea admitted that W. M. was sued as a public officer, and that denying that he was such public officer at the time of recovery, it introduced new matter upon the record, in respect of which the plea should have concluded with a verification, and not to the country: Held, also, that such a plea insufficiently stated a defence that W. M. had ceased to be the public officer of the company, after the commencement of the original suit, and before judgment recovered.

Quære, where a defendant sought to avail himself, in such a case, of a defence that the judgment was obtained by fraud and collusion between the plaintiff and the public officer, how he should take advantage of that defence.—*Fowler v. Rickerby*, 9 D. P. C. 682.

JUDGMENT. See EXECUTION, 2.

JURY.

(*Affidavit of juror, when admissible*.) Affidavits of jurors as to what took place in open court on the delivery of their verdict, are receivable.—*Roberts v. Hughes*, 7 M. & W. 399.

JUSTICES OF THE PEACE.

1. (*How far protected under the Highway Act*.) Justices sued for acting in execution of their office are entitled to the following protection by 24 Geo. 2, c. 44, and 21 Jac. 1, c. 12. 1. A month's notice of action, stating the cause of action. 2. Limitation of action to six months: and 3. Double costs, if the action fails. Justices and others acting under the Highway Act, 5 & 6 Will. 4, c. 50, s. 109, are entitled to—1. *Twenty-one days' notice* of action. 2. Limitation of action to three

months. 3. Costs as between attorney and client: Held, that this clause, giving twenty-one days' notice of action, did not repeal the clause in the previous statute, entitling justices to one month's notice.—*Rex v. Borton*, 4 P. & D. 182.

2. (*Authority of, under 11 Geo. 2, c. 19, s. 16—Mandamus.*) Where the judges of assize, on an appeal against the decision of justices under 11 Geo. 2, c. 19, s. 16, ordering the possession of premises to be given, directed "restitution to be made," following the words of the act, and the convicting justices who gave possession refused to cause restitution to be made, on the ground of want of jurisdiction, the Court refused to order them so to do by mandamus.

Quære, whether the order of the judges of assize is not a sufficient authority for the sheriff to act upon?—*Reg. v. Traill*, 4 P. & D. 325.

LANDLORD AND TENANT.

1. (*Liability of tenant under agreement for lease.*) When a party enters into possession of a farm, and pays rent, under an agreement for a lease containing divers covenants to cultivate, pay rent, &c. he is bound by all the covenants in the agreement applicable to a tenancy from year to year: Held, therefore, where the agreement stipulated for the lease to contain a condition of re-entry if the tenant should grow two successive crops of white corn without fallow, that he might be ejected without notice, if he committed a breach of this covenant.—*Doe d. Thomson v. Amey*, 4 P. & D. 177.
2. (*Covenant by landlord against tenant—Plea of eviction.*) Covenant by landlord against tenant on a farming lease, assigning breaches of covenant; 1. in not repairing; 2. in ploughing meadow land; 3. in depasturing orchards; 4. in cutting and injuring trees, woods, &c.; 5. in underletting without the plaintiff's written consent. Plea, that before any of the breaches assigned, the defendant was evicted and kept out of part of the demised premises by the authority of the plaintiff: Held, no defence to the action.—*Newton v. Allin*, 1 G. & D. 44.

And see MORTGAGOR AND MORTGAGEE; NOTICE TO QUIT.

LARCENY.

- (*By finding.*) A person purchased, at a public auction, a bureau, in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale, no person knew that the bureau contained anything whatever: Held, that if the buyer had express notice that the bureau alone, and not its contents, if any, was sold to him; or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. But that if he had reasonable ground for believing that he bought the bureau, with its contents, if any, he had a colourable right to the property, and it was no larceny. (2 East, P. C. 664; 8 Ves. 405.) —*Merry v. Green*, 7 M. & W. 623.

LEASE.

- (*Lease or agreement.*) On the 21st February, 1825, the defendant wrote to the plaintiff as follows:—"I shall be happy to take a lease of your iron ore at a royalty of 1s. per ton, and I will engage to work the several veins of ironstone, limestone, ore, and manganese, in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores, which I believe to be about forty per cent.; the term to be forty years from the 24th June next, and the sleeping rent 150*l.* per annum. The relative proportion of the iron ores in weight, to be worked together, to be ascertained by a competent

person." The plaintiff wrote to the defendant in reply—"I agree to the terms contained in your letter, and shall be ready to grant a lease conformable thereto, from myself and all other proper parties, whenever you require me:" Held, that these letters constituted only an agreement for a lease, and not an actual demise. (4 Ad. & E. 805; 3 Taunt. 67; 8 Taunt. 65.)—*Jones v. Reynolds*, 1 G. & D. 62. And see *COPYHOLD*, 2; *COVENANT*; *LANDLORD AND TENANT*, 1, 2.

LEGACY DUTY.

A., a British subject, domiciled in England, made his will and died in England, and by his will disposed of certain government notes of the East India Company, issued at Calcutta, and the amount of which was receivable only under an Indian probate; and appointed an English executor. The executor executed a power of attorney to S. in India, who thereupon obtained letters of administration with the will annexed in India, under which he received the amount of the notes, and remitted it to the executor in England, who paid it over to the legatees: Held, that legacy duty was payable thereon. (2 Myl. & Cr. 256.)—*In re Coates*, 7 M. & W. 393.

LIEN.

Where chattels are deposited with a party who claims a lien on them, after notice from the bailor of the sale of the chattels to a third party, the bailee cannot, as against the vendee, claim a further lien in respect of a debt incurred with him by the bailor after such notice, though the chattels remain in his books in the name of the bailor.—*Barry v. Longmore*, 4 P. & D. 344.

LIMITATION ACT.

Debt on covenant for payment of a rent-charge, as being an action of debt upon a specialty, may be brought within twenty years, by 3 & 4 Will. 4, c. 42, s. 3, notwithstanding the limitation of six years, by 3 & 4 Will. 4, c. 27, s. 42, as to the recovery of rent payable out of land. (2 Bing. N. C. 679.)—*Strachan v. Thomas*, 4 P. & D. 229.

LIMITATIONS, STATUTE OF.

1. (*Part payment, how to be proved.*) An acknowledgment of part payment by a defendant, to take a debt out of the Statute of Limitations, under 9 Geo. 4, c. 14, s. 1, must not only be in writing, but be signed by him. (3 Y. & J. 518.)—*Bayley v. Ashton*, 4 P. & D. 204.
2. (*The same.*) A verbal acknowledgment by the debtor, within six years, of the part payment of a debt, is not sufficient to take the case out of the Statute of Limitations. (3 Y. & J. 518; 2 C. M. & R. 723; 4 P. & D. 204.)—*Maghee v. O'Neil*, 7 M. & W. 531.

MANDAMUS.

(*Issue on traverse of return to—Entry of damages—Costs.*) On the trial of issues joined on a traverse of a return to a writ of mandamus, which commanded a scrutiny to be had of the poll at an election of parish officers, the jury found a verdict for the prosecutors, but there was no express finding of damages. The judge before whom the trial was had afterwards directed the verdict to be entered on the *postea* with 1s. damages: Held, that he had authority so to do, and that it was a fit case for the exercise of such authority.

The prosecutors in such a case are entitled to recover damages by force of the statutes 9 Anne, c. 20, s. 2, and 1 Will. 4, c. 21, s. 3, though they have no private or particular interest, apart from the general body of parishioners, in the

matter litigated, And by the same statutes, they are entitled to the costs, as well of the writ as of the subsequent proceedings.—*Reg. v. Fell*, 1 G. & D. 117; see also *Reg. v. Kell*, id. 127.

And see COSTS, 2; JUSTICES OF THE PEACE, 2; MUNICIPAL CORPORATION ACTS, 3; RAILWAY COMPANY.

MINING COMPANY.

(*Authority of mine-agent to pledge credit of shareholders.*) The resident agent, appointed by the directors of a mining company to manage the mine, has not an implied authority from the share-holders of the company to borrow money upon their credit, in order to pay arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging to the mine, for the satisfaction of such arrears, nor in any other case of necessity, however pressing.—*Hawtayne v. Bowns*, 7 M. & W. 597.

MINE. See ORDER OF JUSTICES.

MORTGAGOR AND MORTGAGEE.

(*When relation of landlord and tenant exists between.*) A mortgage deed of the 11th January, 1836, contained a covenant to surrender copyhold property to the mortgagee in fee, as a security for a debt of 850*l.*, which was to be repaid on the 11th July following, and gave the mortgagee power of sale on default. The deed then contained a clause that the mortgagor should, during his occupation of the premises, yield and pay to the mortgagee the yearly rent or sum of 50*l.*, by equal half-yearly payments, on the 11th July and the 11th January in every year, the first half-yearly payment to be made on the 11th July next, and that it should be lawful for the mortgagee to have and use such remedies by distress, as landlords have for rent upon common demises, *provided that the reservation of such rent should not prejudice the right of the mortgages to enter into and take possession of the premises covenanted to be surrendered, and evict the mortgagor, at any time after default made in payment of the monies thereby intended to be secured.* In November, 1837, the mortgagee distrained for 50*l.*, "being for rent due up to the 11th July last:" Held, that the above reservation of rent, and distress for rent, had not created the relation of landlord and tenant between the parties, so as to entitle the mortgagor to notice to quit before ejectment.—*Doe d. Garrod v. Olley*, 4 P. & D. 275.

MUNICIPAL CORPORATIONS ACT.

1. (*Duty of overseers in respect to burgess list.*) The mere omission, whether wilful or not, to sign the burgess list, under 5 & 6 Will. 4, c. 76, s. 15, subjects an overseer to the penalty under sect. 48.

A declaration in debt against an overseer for such a penalty, stated that it was the duty of the defendant, and of the other overseers of the parish, to make out and sign the burgess list; that the defendant, as such overseer, ought to have signed, but that the defendant did not make out and sign such list. Plea, not guilty "by statute."

On motion in arrest of judgment, on the ground that signature by the majority of overseers would be sufficient, as being virtually the signature of all, and ought, therefore, to have been negatived by the declaration: Held, that the defect, if any, was cured by the verdict, because, if the signature of the majority would have been the signature of *all*, it had been negatived by the verdict, which found that the defendant had not signed.

Seemle, per Patteson J. that all the overseers must sign the burgess list; and

that where the parish consists of several divisions, and has an overseer acting separately for each division, the statute is not satisfied by each overseer signing a separate list for his own division only.—*King v. Burrell*, 4 P. & D. 207.

2. (*Compensation to town clerk.*) In the year 1833 H. was elected town clerk to the corporation of C. quamdiu bene se gesserit. He remained in office up to the 1st January, 1836, but neglected to make the declaration required by 9 Geo. 4, c. 17. On the 1st January the new town council of C. removed him from his office, under the provisions of the Municipal Corporation Act: Held, that he was entitled to compensation under the 66th section.—*Reg. v. Mayor of Cambridge*, 4 P. & D. 294.
3. (*Election of councillor—Mandamus or quo warranto.*) On an election of councillors for a ward in the borough of Leeds, the presiding alderman and assessors before 2 P.M. on the day but one after the election published, according to the stat. 5 & 6 Will. 4, c. 76, s. 35, a declaration, containing a list of the councillors elected, which included the name of P. After two o'clock, the alderman and assessors, having discovered a supposed error in counting the legal votes, signed and published a second list, omitting the name of P., and substituting that of R. Both parties afterwards made the declaration prescribed by the statutes 9 Geo. 4, c. 17, s. 2, and 5 & 6 Will. 4, c. 76, s. 50; but upon P.'s claiming to act, the mayor and town council refused to permit him, and allowed R. to act: Held, on application by P. for a mandamus to the corporation to receive and count his vote, that this was the proper remedy, for that the office was not full of R.; the publication and subsequent acting by him being merely void, and P. being in de facto.—*Reg. v. Mayor of Leeds*, 11 Ad. & E. 512.
4. (*Burgess list—Mandamus.*) Where the overseers of one of several parishes in a borough omitted to make out the burgess list required by the 5 & 6 Will. 4, c. 76, s. 15, so that at the court of the mayor and assessors for revision of the lists, there was no list in which the name of a claimant for that parish could be inserted: Held, that this intermediate defect in his title to be upon the general burgess roll, which is made up of the several parish lists, did not preclude the Court of Queen's Bench from issuing a mandamus to the mayor, under the 1 Vict. c. 78, s. 24, to insert his name in the burgess roll.
Such a mandamus is not preremptory in the first instance.—*Reg. v. Mayor of Lichfield*, 1 G. & D. 28.
5. (*Jurisdiction of borough sessions.*) Since the stat. 5 & 6 Will. 4, c. 76, the borough sessions have jurisdiction to try appeals against orders of removal; and whether or not, since the passing of that statute, they have *exclusive* jurisdiction over such appeals, if they are the next sessions after the order is made, the county sessions have no jurisdiction to try such appeal.—*Reg. v. Inhabitants of St. Edmunds, Sarum*, 1 G. & D. 137. But it has since been decided, that the borough sessions have *exclusive* jurisdiction to try the appeal, where the order was made by borough justices.—*Reg. v. Justices of Salop*, Id. 146.
6. (*Charter of incorporation under 1 Vict. c. 78, s. 149—Form and requisites of the charter—Pleading.*) A petition, which had been agreed upon at a meeting of the rate-payers of the parliamentary borough of Manchester, convened by public advertisement, and which was in fact attended by 1000, and which petition was afterwards signed by 4000 inhabitant householders of the borough, was presented to her Majesty, praying for the grant of a charter of incorporation to the inhabitants of such borough, under the provisions of the stat. 1 Vict. c. 78, s. 49,

Afterwards, and before the day appointed for this petition being taken into consideration by the Privy Council, a counter petition, signed by 6000 of such inhabitant householders, was presented to her Majesty, praying her not to grant such charter. The whole number of inhabitant householders of the borough amounted to 48,000: Held (on error in the Exchequer Chamber),—

1. That the second petition did not necessarily, in point of law, deprive her Majesty of the power to grant such charter upon the first petition; but that whether the first petition was, under all the circumstances, the petition of the inhabitant householders of the borough, so as to authorize the exercise of the powers conferred by the 1 Vict. c. 78, s. 49, was a question of fact for a jury; and that the determination of the Privy Council to advise the Crown to grant the charter upon such petition, was not conclusive of its validity.

2. The grant of such charter of incorporation is an exercise of the common law prerogative of the Crown, although it also extends to the new corporation the powers of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, which the Crown has power to do only by virtue of the 1 Vict. c. 78, s. 49.

3. Such charter may be granted to a *part* only (to be defined therein) of the borough from the whole of which the petition emanated, and need not be conferred upon the inhabitant householders of the whole borough.

4. The Crown may, by its common law prerogative, appoint in such charter the number, and set out the limits of the wards in the new borough.

5. The Crown may also by such charter delegate to an individual the power of appointing the first members of such corporation; or may, at all events, appoint a person to ascertain the individuals who compose the class to whom the charter is granted. [Lord Denman, C. J. and Williams, J. diss.]

6. The provisions of the 5 & 6 Will. 4, c. 76, as to the machinery for the formation and revision of the burgess lists, being applicable only to then existing corporations, and to the particular period at which that act took effect, need not be precisely followed in the case of new corporations created by charter under the powers conferred on the Crown by the 1 Vict. c. 78, s. 49, but may be followed *cy près*. Therefore the appointment in such charter of individuals named therein, to make out and revise the lists, and to act as returning officer at the first election under such charter is good. So also, days for holding the first elections, though not agreeing with those named for the elections in the 5 & 6 Will. 4, c. 76, may be appointed by such charter.

7. Nor is such charter void because it directs the person appointed to make out the first list, to include in it only "all inhabitant householders within the borough who shall possess the qualifications required by the 5 & 6 Will. 4, c. 76," instead of including also all persons occupying shops, &c. within the borough, and being inhabitant householders residing within seven miles thereof, according to the schedule to that act. [Williams, J. dubitante.]

8. The stat. 5 & 6 Will. 4, c. 76, s. 103, empowers the Crown to grant a separate court of quarter sessions, on petition of the council of any borough, "setting forth the grounds of the application, the state of the gaol, and the salary they are willing to pay the recorder in that behalf:" Held, that a plea stating that the application was "by petition to her said Majesty in council, setting forth the matters in and by the said act of parliament, intituled 'An Act, &c.' in that behalf required and directed," was sufficient after verdict.—*Rutter v. Chapman*, 8 M. & W. 1.

And see *COSTS*, 3; *QUO WARRANTO*.

NOTICE TO QUIT.

In ejectment to recover a farm at H. the notice to quit described the premises to be at D., which was a distinct parish, but as it did not appear that the defendant was misled by the notice, held that it was sufficient. (4 Esp. 185; 11 East, 245.)—*Doe d. Armstrong v. Wilkinson*, 1 P. & D. 323.

And see JUSTICES OF THE PEACE, 1.

ORDER OF FILIATION.

(*Quashing*.) Where an indictment at common law for disobeying an order of sessions made pursuant to 4 & 5 Will: 4, c. 76, ss. 72, 73, for the maintenance of a bastard child, was defective, but only on points that would render it bad on demurrer, the Court refused to interfere by quashing it.—*Reg. v. Taylor*, 9 D. P. C. 600.

ORDER OF JUSTICES.

1. (*Removal of by certiorari—Notice to justices*.) Notice to magistrates of an intention to apply for a certiorari to remove an order of sessions, pursuant to 13 Geo. 2, c. 18, s. 5, should set forth distinctly who the parties are applying for the writ.

The affidavit of service of the notice ought to shew that the magistrates served were those by whom the order was made, and it is not sufficient that from other affidavits it may be collected that the magistrates who made the order and those served had the same names. (4 B. & Ald. 289; 3 B. & Ad. 887.)

The sufficiency of the notice is still open to objection, although the rule for a certiorari has been enlarged by consent, and the justices have appeared to shew cause.—*Reg. v. Inhabitants of Kensington*, 4 P. & D. 320.

2. (*Grounds of appeal against—Examination*.) It is a good ground of appeal, under the stat. 4 & 5 W. 4, c. 76, s. 81, against an order of removal, that the examination on which it was made, though it sets forth facts which shew a settlement, does not disclose any legal evidence of such facts. Where, therefore, an order was made on the examinations of the pauper and his father, in which the father stated that the place of his father's settlement was E., as he had heard his father say and believed to be true, and that he had heard his father say he had received relief from the overseers of E.; and the pauper himself stated that his father's place of settlement was at E., as he had heard him say and believed to be true: Held, that the order was bad on an appeal stating, as one of the grounds, that the order "was bad and inoperative," and the examinations "defective and insufficient to ground and support the same."—*Reg. v. Inhabitants of Ecclesall Bierlow*, 11 Ad. & E. 607; 1 G. & D. 160; *Reg. v. Inhabitants of Tetbury*, 11 Ad. & E. 615, n.; 1 G. & D. 166, n.: see also *Reg. v. Inhabitants of Lydeard St. Lawrence*, 11 Ad. & E. 616.

3. (*Same*.) An examination stated an apprenticeship, and a service in the appellant parish with a party other than the master, but did not state the master's consent: Held, that the examination (so far as regarded a settlement by apprenticeship) was bad on the face of it; and that, although the apprentice stated in the examination, that it was agreed, in the indenture, that he should serve the last 40 days of his apprenticeship in L. the appellant parish, and added "and I served the last 40 days in L. with A. H. my master's father."

Held also, that the objection was sufficiently taken by objecting that it did not appear that the examinant served A. H. with the consent of his master, or in any other manner under any indenture of apprenticeship, &c., and that the examina-

tions were too general, and were wanting in sufficient particularity, in each of these respects.

Semble, (per Patteson J.) that where the settlement relied upon is a derivative one from the pauper's father, whose alleged settlement is by apprenticeship, the examination should give the date of such apprenticeship.—*Reg. v. Inhabitants of Lydeard St. Lawrence*, 11 Ad. & E. 616.

4. (*Quashed on appeal, how far conclusive.*) A pauper was removed from B. to C. on an examination of himself, stating a settlement by occupation of a tenement from June, 1827, to June, 1828. This was denied by the notice of objections; and on appeal, the occupation appeared to have been from June, 1828, to August, 1829, whereupon the sessions quashed the order. The same pauper was afterwards again removed from B. to C., on a fresh examination of himself, stating a settlement by occupation of the same tenement from June, 1828, to August, 1829. This order was held to have been rightly objected to on appeal, on the ground that the former order was conclusive between B. and C. (7 Ad. & E. 471).—*Reg. v. Inhabitants of Clint*, 11 Ad. & E. 624, n.
5. One order of removal may include two members of a family, although they have independent settlements. (1 Stra. 471; 1 Burr. S. C. 88, 138).—*Reg. v. Inhabitants of All Saints, Newcastle-upon-Tyne*, 1 G. & D. 133.
6. (*Statement of grounds of removal.*) The grounds of removal must be stated as explicitly as the grounds of appeal. Under an examination stating generally that the pauper is settled in the appellant parish, the respondents will not be allowed to prove a settlement there by hiring and service. (10 Ad. & E. 685, 688, 693; 11 Ad. & E. 90).—*Reg. v. Inhabitants of Eastville*, 1 G. & D. 150.

And see MUNICIPAL CORPORATIONS ACT, 5.

PARTICULARS OF DEMAND.

(*Application of rule of T. T. 1 Vict.*) The particulars of the plaintiff's demand stated the action to be brought "to recover a sum of 27l. 13s., being the balance due from the defendants to the plaintiff on the account as under, after giving credit for all payments on account, and for such sums as the defendants may have to set off against the plaintiff." Then followed a statement of the items of the plaintiff's demand, to the amount of 116l.: Held, that these particulars did not, within the meaning of the rule of Court, T. T. 1 Vict., give credit for "a sum of money admitted to have been paid," or claim a balance within the meaning of the proviso.—*Morris v. Jones*, 1 G. & D. 13.

And see GOODS SOLD AND DELIVERED.

PENSION.

(*When assignable.*) A compensation granted to a public civil officer on the reduction of offices in his department, under the 4 & 5 Will. 4, c. 84, is not assignable by him.—*Wells v. Foster*, 149.

PERJURY.

(*Indictment.*) An indictment for perjury contained three assignments. The first and third assignments being almost identical, the judge who tried the case, in summing up, for the sake of convenience, resolved the three assignments into two, and then directed the jury upon that assignment which stood second in the indictment as the first assignment, and upon the assignment which stood first and third as together forming the second assignment. The jury found the defendant not guilty on the first assignment, and guilty on the second: meaning, as

was admitted, to treat the assignments as they were treated in the summing up, and to find defendant guilty on the first and third, and not guilty on the second. The judge, on application, made an order to amend the *postea*, (from his recollection of what passed at the trial,) by entering the verdict for the crown on the first and third, and for defendant on the second assignment. But the Court, as a matter of discretion, thought that such an amendment should not be made from the judge's recollection.

An indictment for perjury alleged that a petition was presented to the House of Commons against the return of B. on the ground of bribery; that shortly before his election, to wit, on the 6th July, B. and C. went to the house of defendant to solicit his vote, that at the trial of the petition, it was a material question whether at the said time when B. and C. went to defendant's house a certain act of bribery took place; that defendant was a witness sworn to speak the truth of and concerning the said premises, and that she deposed touching the said election and the matter of the petition, that, shortly before B.'s election, B. and C. came on a canvassing visit to defendant's house, and that the act of bribery then took place, (*innuendo*) thereby meaning that at the said time when B. and C. went to defendant's house as aforesaid the act of bribery was committed.

Held, on motion in arrest of judgment, 1st, That the allegation that defendant deposed "touching the said election," &c. sufficiently pointed to the matter, whereupon the defendant was sworn as a witness. 2nd. That the *innuendo* did not introduce new matter, as from the introductory averment it appeared there was a canvassing visit on the 6th July, and the deposition of the defendant was shown to refer to that particular time and no other.—*Reg. v. Virrier*, 4 P. & D. 161.

PEW. See PROHIBITION, 2.

PLEADING.

1. (*Several pleas in action by railway company.*) By a railway act a company were allowed, in debt for calls, to declare generally that the defendant, being the proprietor of a share, was indebted to the company in such a sum as the calls should amount to, whereby an action had accrued, without setting forth the special matter; and it was also provided that at the trial of such an action it should only be necessary to prove that the defendant, at the time of making such calls, was the proprietor of a share, and that such calls were in fact made, and that such notice was given as directed by the act, without proving the appointment of the directors who made such calls, or any other matter whatsoever.

The Court, in their discretion under the statute of Anne, out of the following pleas in several cases, allowed the first three only.

1. *Nunquam indebitatus.*
2. That defendant was not a proprietor.
3. That the shares were forfeited.
4. That at the meetings at which the calls were made there was not present a competent number of directors who had paid up previous calls.
5. That no notice had been given of the calls (as required by the act).
6. That no time or place for payment of the calls had been appointed (as required by the act).
7. That the calls were not made for the purposes of the undertaking.

8. That the calls were not made upon all the shareholders (as required by the act).
9. That the calls were not made by competent persons. (6 Bing. N. C. 135, 270.)—*South-Eastern Railway Company v. Hebblewhite*, 4 P. & D. 246.
2. (*Plea of not guilty by statute, effect of.*) Where a statute enables a defendant to plead the general issue and give the special matter of defence in evidence, the plea of not guilty so pleaded is not affected by the new rules of H. 4 W. 4, but operates as before they were framed; and puts in issue not only the defences peculiar to the statute, but all that would have arisen under not guilty at common law. Therefore the Court, in the exercise of its discretion under the 4 Ann. c. 16, s. 4, will not allow a defendant to plead not guilty by statute, together with a special plea, although such plea raise a defence independent of the statute. (1 C. M. & R. 61; 5 D. P. C. 773; 9 D. P. C. 39.)—*Ross v. Clifton*, 11 Ad. & E. 631; 1 G. & D. 72.
3. (*Same.*) The plea of not guilty by statute, pleaded under the stat. 11 Geo. 2, c. 19, s. 21, in an action for an excessive distress, puts in issue not only the matter of justification, but also the tenancy, and the ownership of the goods.—*Williams v. Jones*, 11 Ad. & E. 643.
4. (*Negative pregnant—F frivolous demurrer.*) To a declaration for goods sold, the defendant pleaded that the goods were sold with the plaintiff's privity by one H. as the owner thereof; that defendant had no knowledge that the goods belonged to the plaintiffs, and that the defendant had a set-off against H. Replication, that the goods were not sold with the plaintiffs' privity by H. as the owner thereof. The Court set aside a demurrer to this replication as frivolous.—*Pigeon v. Osborn*, 4 P. & D. 345.
5. (*Profert.*) The plaintiff in covenant alleged as excuse for profert that the deed, "being in the possession of the defendant," the plaintiff was unable to produce it: Held, that a plea which stated only that the deed "is not in the possession of the defendant modo et forma" was bad." (3 T. R. 186.)—*Fisher v. Ford*, 4 P. & D. 347.
6. (*Ambiguity—F frivolous demurrer.*) A declaration in debt stated, that the defendant was indebted to the plaintiff "for goods sold and delivered to the defendant by the plaintiff at his request." The defendant having demurred specially to this declaration, on the ground of its being ambiguous, the Court set the demurrer aside as frivolous.—*Deriemer v. Fenna*, 7 M. & W. 439.
7. (*Duplicity—Negative pregnant.*) Assumpsit by the indorsee against the acceptor of a bill of exchange, drawn by D. upon the defendant. Plea, that the defendant, by D., his agent duly authorized in that behalf, paid to the plaintiff, and the plaintiff then accepted and received of D. as such agent, a certain sum in full satisfaction and discharge of the causes of action. Replication, that the defendant, by D. his agent, did not pay to the plaintiff, nor did the plaintiff accept or receive of D., as such agent, the said sum in full satisfaction and discharge of the promises in the plea mentioned: Held, on special demurrer, that the replication was good.—*Bennison v. Thelwell*, 7 M. & W. 512.
8. (*Traverse of quæ est eadem.*) Declaration in assumpsit by drawer against acceptor of a bill of exchange for 728*l.* 6*s.*, dated the 15th of February, 1840, payable three months after date. Plea, as to 609*l.* 10*s.*, parcel of the monies in that count mentioned, that after the acceptance of the bill in that count

mentioned, the defendant paid to the plaintiff the sum of 700*l.* in full satisfaction and discharge of (inter alia) the sum of 609*l.* 10*s.*, parcel of certain monies mentioned and specified in a certain bill of exchange, bearing date 15th of February, 1840, and drawn by the plaintiff upon and accepted by the defendant, and that the plaintiff accepted and received the said sum of money in such full satisfaction and discharge: and that the bill of exchange in the count mentioned was and is the same identical bill as that in the plea mentioned, in respect whereof the said payment was so made, and not any other or different bill. Replication, that the bill in the count mentioned was not nor is the same identical bill as that in the plea mentioned, &c., &c.: concluding to the country: Held bad on special demurrer. (1 Ad. & E. 310.)—*Wheeler v. Senior*, 7 M. & W. 562.

9. (*Declaration in assumpsit—Breach.*) A declaration in assumpsit stated, that one W. A. S. was in the custody of the warden of the Fleet in execution at the suit of the plaintiff, upon a judgment in this Court, and that in consideration that the plaintiff would cause him to be discharged, and would take his warrant of attorney for the debt and costs, the defendant undertook that W. A. S. should be forthcoming to satisfy the amount of the judgment to be entered up on the warrant of attorney, on the 18th July, 1840, at the office of Mr. A., and also, that one day's previous notice of meeting W. A. S. should be given to Mr. A.:—Averment, that the plaintiff, confiding, &c., did discharge W. S. A. out of custody, and took a warrant of attorney for the debt and costs: Breach, that W. A. S. was not forthcoming to satisfy the amount of the judgment so to be entered up as aforesaid, at the day and place agreed on, nor was one day's notice, &c., given to Mr. A.: Held sufficient, on motion in arrest of judgment, without an averment that judgment was actually entered up on the warrant of attorney.—*Puge v. Jarvis*, 8 M. & W. 136.
10. (*Plea of tender after breach—Repleader.*) Assumpsit on a special agreement, whereby, in consideration of the sale to the defendant of a portrait, and the exclusive right of engraving the same for publication, the defendant promised to pay 150*l.*, and to deliver to the plaintiff fifty proof impressions of the engraving, when made therefrom. The declaration averred, that the engraving was made, and that the money was paid, and alleged as a breach, that although a reasonable time had elapsed for the delivery of the fifty proof impressions, and although the defendant was required to do so, yet the defendant had not delivered them or any part of them, and had neglected and refused so to do. Plea, that after the making of the promise in the declaration mentioned, and after the making of the said engraving, the defendant delivered to the plaintiff ten proof impressions thereof, in part performance of his said promise, and the plaintiff accepted the same in satisfaction and discharge of the promise as to ten of the fifty impressions; that he then was ready and willing, and then tendered and offered to the plaintiff, to deliver to him forty other impressions of the said engraving, which the plaintiff then refused to accept or receive, and then requested the defendant to let him have the choice of forty of all the impressions that were printed, to which request the defendant then acceded, and the plaintiff then promised the defendant to make his selection of the said forty proof impressions out of all the impressions that were then printed: that he had always been ready and willing to let the plaintiff choose the said forty out of all the impressions then printed, but that the plaintiff had never made any selection of the same, but had always thence hitherto neglected to do so;

absque hoc that the defendant refused and neglected to deliver to the plaintiff the said fifty proof impressions, as in the declaration in that behalf alleged : Held, that the plea was bad after verdict. Where there are several pleas on the record, if one of them traverses immaterial matter in the declaration, and the defendant has pleaded other material matters which have been disposed of on proper issues, the court will not grant a repleader. (6 Bing. N. C. 453.)—*Negelen v. Mitchell*, 7 M. & W. 612.

11. (*Actionem non.*) Debt for 200*l.* for work and labour, money paid, and on an account stated. Pleas, 1. nunquam indebitatus : 2. as to 17*l.* 6*s.* 3*d.*, parcel, &c. a set-off : 3. as to 2*l.* 10*s.*, other parcel, &c. payment. Held, on special demurrer, that the two latter pleas were good without the allegation of actionem non or prayer of judgment. (2 Ad. & E. 696 ; 2 M. & W. 72 ; 9 Ad. & E. 861 ; 4 N. C. 388.)—*Ratten v. Davis*, 1 G. & D. 21.
12. (*Illegality, always to be specially pleaded.*) A defendant cannot take advantage of an illegality to avoid the contract, without having pleaded it specially, although the illegality is disclosed in the course of the plaintiff's case, and without any evidence being given for the defendant. (5 M. & W. 456.)—*Fenwick v. Laycock*, 1 G. & D. 27.
13. (*Several pleas.*) To an action on an agreement to deliver etchings of certain drawings to be supplied by the plaintiff, the defendant sought to plead (in addition to pleas of non assumpsit—that the plaintiff delivered unfit and improper outlines,—that the defendant was prevented by the act of God from completing his contract,—and leave and licence), these three further pleas :—1. that the plaintiff did not supply the drawings ; 2. that he neglected to supply the drawings for an unreasonable time after the making of the agreement, and thereby prevented the defendant from delivering the etchings within the specified time ; and, 3. that the plaintiff delivered the drawings, but that they were unfit and improper for the purpose. The Court refused to allow these three pleas, but gave the defendant leave to select one from among them.—*Griffiths v. Roberts*, 9 D. P. C. 674.
14. (*Plea of payment in debt.*) Debt for goods sold, &c. Plea, nunquam indebitatus except as to 5*l.* 10*s.* 3*d.* ; as to that sum, the defendant pleaded, to the further maintenance of the action, payment of 5*l.* 13*s.* 7*d.*, in full satisfaction and discharge of all the causes of action relating to 5*l.* 10*s.* 3*d.* ; taking no notice of the damages and costs. Held, on special demurrer, that the plea was good, and that the plaintiff might sign judgment for any damage unanswered. (3 Ad. & E. 673 ; 4 B. & C. 886.)—*Henry v. Earl*, 9 D. P. C. 724.
15. (*Pleading statute, mode of.*) It is incorrect to plead a statute as passed "in the first and second years of the reign of," &c. : it should be stated as passed "in a session of parliament, held in the first and second years, &c." (1 Ad. & E. 327.)—*Gibbs v. Pike*, 9 D. P. C. 731.
16. (*Counsel's signature.*) Where a special plea requiring counsel's signature is delivered unsigned, the plaintiff may sign judgment, although there are also other pleas to the whole declaration, which do not require counsel's signature. (1 C. M. & R. 577.)—*Shield v. Twigg*, 9 D. P. C. 751.
17. (*In action on bill of exchange—Replication to plea in denial that plaintiff was the holder.*) Indorsee against drawer of a bill of exchange. Plea, that after the indorsement to the plaintiff, and before the commencement of the suit, the plaintiff indorsed the bill to certain persons whose names are to the defendant

unknown, and who, from the time of such indorsement until and at the time when the bill became due, and until and at the commencement of the suit, were the holders thereof. Replication, that the said persons in the plea mentioned were not, when the action was commenced, the holders of the bill, modo et formâ. Held, on special demurrer, that the replication was good, although the more scientific mode of replying would have been that the plaintiff was the holder of the bill at the time of action brought, *absque hoc* that the persons mentioned in the plea were at that time the holders. *Semble*, that the plea was bad on special demurrer, as being an argumentative denial that the plaintiff was the holder at the time of action brought.—*Fraser v. Welsh*, 9 D. P. C. 754.

And see *BILLS AND NOTES*, 1, 6; *BOND*, 2; *ECCLESIASTICAL COURT*; *ESCAPE*; *LANDLORD AND TENANT*, 2; *SHERIFF*, 1; *TRESPASS*, 1.

POLICY OF ASSURANCE. See *BANKRUPTCY*, 2.

POOR RATE.

1. (*Rateability of Cemetery Company.*) A company was empowered by statute to purchase land for the purpose of a cemetery, and to lay out and inclose the same, and to build therein vaults and catacombs, and to sell in perpetuity or for a limited period the exclusive right of interment in them, subject to such regulations and conditions as the company should think fit. The purchasers of such exclusive right of interment in such vaults, &c. were to close them up with doors. The company was required to keep the cemetery and the several buildings therein, and the external walls and fences thereof, in complete repair, and was restrained from selling any land which should have been consecrated and set apart for the burial of the dead. The company having under these provisions established the cemetery, &c. annually sold in perpetuity the exclusive right of interment in vaults, &c. erected by them. The purchasers had the keys of such vaults delivered to them after closing them up as directed, and the purchasers did all necessary repairs to such vaults, &c., the company never exercising any act of ownership therein after such sales.

Held, that the company occupied the lands in which such exclusive right had been sold, and was liable to the poor rate in respect of the purchase money, as a profit of such land. (14 East, 256; 6 Ad. & E. 219; 13 East, 155.)—*Reg. v. Inhabitants of Kensington*, 4 P. & D. 327.

2. (*Rateability of mine-owner.*) The owner of wastes and of the mines and minerals under them demised certain lead mines for twenty-one years, the lessees to yield one-fifth share of the ore raised by them, well cleansed, and made merchantable and fit for the smelting mill. The ore before delivery to the lessor had to undergo a very laborious and expensive process in being bruised, dressed and made merchantable and fit for smelting, by which all foreign substances were separated from the ore, but the character of the ore was not otherwise altered: Held, that the lessor was liable to the poor rate in respect of his fifth, as an occupier of land. (3 P. & D. 434.)—*Reg. v. Todd*, 4 P. & D. 335.

3. (*Rateability of docks.*) By the stat. 43 G. 3, c. clx (for improving the port of Bristol), a dock company was formed, with power to convert a portion of a navigable river within the city into a floating harbour, and to make a new course for the river, and a bason to form a passage from the new course into the floating harbour, and to execute divers other works. By s. 74, certain dues were made payable to the company for every ship entering the port, which dues,

after defraying the expenses of repairing the bason, and other works, were to be divided among the shareholders of the company. By s. 64, reciting that the lands which the company were authorized to take for the execution of the works, would, during the time the said intended works were being carried on, and for many years afterwards, be rendered unproductive, and be incapable of being rated in aid of the land and parochial taxes, the company were made chargeable, from the time of their taking possession of such lands, with all such land and parochial taxes as the same lands were then or might thereafter be subject to.—The port is entered in the Bristol Channel, and nearly 30 miles from the parish in which the bason is situate.

Held, that no portion of the dues payable by ships on entering the port was a profit arising from the bason, and that the bason was rateable to the relief of the poor as ordinary land, and not in respect of such dues. (14 East, 621; 1 B. & Cr. 506; 5 B. & C. 797; 3 B. & Ad. 553; 4 Ad. & E. 40.)—*Reg. v. Bristol Dock Co.*, 1 G. & D. 76.

PRACTICE.

1. (*Service of rule to compute.*) Service of a rule to compute principal and interest on a bill of exchange or promissory note, upon one of several defendants, is sufficient, as service upon one is service upon all. (2 C. & M. 424.)—*Amlot v. Evans*, 7 M. & W. 462.
2. (*Staying proceedings in second action for same cause.*) The Court will not stay the proceedings in an action on an affidavit that a former action had been brought between the same parties for the same cause of action, which was settled by the defendant paying the debt and costs: the defendant must plead the former recovery in bar.—*Ross v. Jacques*, 8 M. & W. 135; 9 D. P. C. 737.
3. (*Judgment as in case of nonsuit.*) The insolvency of the defendant is not a valid ground for discharging a judgment as in case of a nonsuit, unless it appear that the knowledge of such insolvency did not come to the plaintiff before the last step taken by him in the cause. (8 D. P. C. 859.)—*Topping v. Brown*, 9 D. P. C. 583.
4. (*Inspection of documents.*) The Court refused to compel the plaintiff to furnish the defendant with a copy of a document the contents of which were set forth on the face of an inquisition post mortem filed in the Rolls Chapel, for the purpose of an argument on a rule for a new trial obtained by the defendant on the ground of surprise, in an action of trespass, in which the question was as to the plaintiff's title to an estate, which it was supposed might be varied by the contents of such deed at another trial.—*Wood v. Morewood*, 9 D. P. C. 669.
5. (*Inspection of documents—Authority of judge at chambers.*) Where a judge at chambers had made an order on the plaintiff to permit the defendant to inspect and take a copy of a promissory note on which the action was brought, the Court refused to grant a rule to rescind that order, although it was sworn that no special grounds were stated upon affidavits on which the order was founded. (1 Bing. 161, 451.)—*Woolner v. Devereux*, 9 D. P. C. 672.
6. (*Judgment of non pros., when to be signed.*) Judgment of non pros. for not declaring cannot be signed before the end of the term next after an appearance is entered.—*Foster v. Pryme*, 9 D. P. C. 749.

PRINCIPAL AND AGENT.

(*Liability of committee-men of club.*) A club was formed, by the regulations of which the members paid entrance-money and an annual subscription, and cash

was paid for provisions supplied to the house. The funds of the club were deposited at a banker's, and a committee was appointed to manage the affairs of the club, and to administer the funds, but no member of the committee had authority to draw cheques, except three who were chosen for that purpose, and whose signatures were countersigned by the secretary: Held, in an action brought against two of the committee by a tradesman who had supplied wine on credit, ordered by a member of the committee for the use of the club, that the tradesman was not entitled to recover without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the club.—*Todd v. Emly*, 7 M. & W. 427.

And see MINING COMPANY.

PROBATE. See ECCLESIASTICAL COURT.

PROCESS.

(*Distringas, at what time it may issue.*) A *distringas* may issue after the expiration of four months from the issuing of the writ of summons.

A writ of summons was issued on the 5th of July, but it did not appear whether any attempt was made to serve it or not. On the 5th of December, an alias writ of summons was sued out, and the plaintiff not being able to effect service of it, obtained a *distringas*, as for non-appearance to the original writ of summons: Held, that the *distringas* was not irregular. (5 Bing. N. C. 279.)—*Pearce v. Swain*, 7 M. & W. 543; 9 D. P. C. 732.

PROHIBITION.

1. (*For what it lies.*) It is no ground for prohibition to the ecclesiastical court, that depositions have been improperly taken with reference to the 10 Geo. 4, c. 53, s. 9, for this is matter of irregularity in practice only.—*Jolly v. Baines*, 4 P. & D. 224.
2. (*Pew—Faculty.*) By a faculty granted in 1738 by the ecclesiastical court of Ely, the Masters of Arts' Pit and the north and south galleries of the parish church of St. Mary, Cambridge, were appropriated to the university. In 1819, by agreement with the then churchwardens, the university, at their own sole cost, enlarged the Masters of Arts' Pit and the galleries, and erected ten new pews, and for that purpose removed the organ into the tower, and made other alterations: and the university afterwards instituted, by letters of request, a suit in the Court of Arches against the churchwardens and parishioners, to confirm the erections and alterations, and to appropriate the same to the university and their successors exclusively. The official principal received the letters of request and the act on petition, answer, and reply.—To a declaration in prohibition by the churchwardens and parishioners, disclosing these facts, the university demurred: and the Court gave judgment for the defendants, on the ground that, even if the grant of a faculty for a pew to a corporation were illegal, and that prohibition would lie for a faculty before it is granted, (which was doubted), yet a faculty to confirm erections and alterations would be legal; and the ecclesiastical court had as yet done nothing illegal, and it was not to be presumed that that Court would not limit the faculty to those objects which might be legally embraced in it.—*Hallack v. University of Cambridge*, 1 G. & D. 100; 9 D. P. C.

QUO WARRANTO.

An information in the nature of a quo warranto will be granted against a party for claiming to be councillor of a borough, on affidavit that he has taken upon himself the office, and acted in that capacity, and has been seen present at meetings of the council acting as a councillor, although the nature of the acceptance or the acting be not further specified, nor it be stated that he has made the declaration under the 5 & 6 W. 4, c. 76, s. 50.

It is no answer, on a motion for such information, (founded on objections to the election of the party on the ground of personation and want of title in some of his voters), that, upon the defendant's affidavit, enough of the opposite party's voters are bad to reduce his poll below that of the defendant: although the objections to them be founded on a comparison of the voting papers with the burgess roll, both verified by affidavit: for the Court will not hold parties disqualified on affidavits which there is no opportunity of contradicting.

An inhabitant of the borough, though not a burgess, may be the relator in such case. (11 Ad. & E. 505.)—*Reg. v. Quayle*, 11 Ad. & E. 509.

And see **MUNICIPAL CORPORATION ACTS, 3.**

RAILWAY ACT.

(*Calls, when well made—Transfer of shares—Register of proprietors.*) The Sheffield and Manchester Railway Act (7 W. 4, c. xxi.), by s. 115, empowered the directors from time to time to make such calls from the proprietors, on their respective shares, as they from time to time should find necessary, so that no call should exceed 10*l.* on each share, and that there should be an interval of three calendar months between each successive call, and twenty-one days' notice should be given of every such call by advertisement in the local newspapers; and the proprietors were thereby required to pay the calls on their shares to such person, at such time, at such place, and in such manner as the directors should from time to time direct or appoint. The directors made a resolution for a call, specifying therein the amount of the call, and the day of payment, but not the place where, or the person to whom, the payment was to be made: but a notice of that call, subsequently inserted in the local newspapers, according to the directions of the act, specified all those matters. In an action for the amount of such call against a party who was a proprietor at the date of the resolution, of the notice, and of the day appointed for payment, it not appearing also that there was any change in the directory during that interval: Held, that the call was properly made. (7 M. & W. 243.)

By another resolution made on the 13th of March, the directors resolved that a call of 5*l.* should be made on the 30th of March instant, to be paid on the 1st of May: Held, that the call was not invalid, because the resolution was prospective.

Some of the directors by whom the resolutions for the call were made, were members of a banking company who were the bankers and treasurers of the railway company, and as such received and gave receipts for calls, and paid cheques drawn by the directors, &c. A clause of the act of parliament (s. 150) enacted, that no person concerned or interested in any contract with the company should be capable of being chosen a director, and that if any director should directly or indirectly be concerned in any contract with the company, he should thereupon be immediately, and was thereby discharged from the direction: Held, that this clause applied only to contracts made with the company in prosecution of its enterprizes, and did not disqualify the directors above-mentioned.

Another clause (s. 159), directed that the orders and proceedings of the directors should be entered in a book and signed by the chairman of the meeting, and enacted, that when so entered and signed, they should be deemed originals, and be read in evidence without proof of the persons making or entering them being directors, or of the signature of the chairman: Held, that a book of proceedings purporting to be signed "W. S., deputy chairman," was evidence *per se*, without proof that W. S. in fact presided as deputy chairman at the meeting.

A transfer of railway shares from an original subscriber to the undertaking made before the formation of a register of proprietors pursuant to the act, but after the passing of the act of parliament, is good, although the transferor be never registered as a proprietor.

Where the act required such transfer to be by deed, and a transfer of shares was executed by the seller with a blank for the purchaser's name, and stating the consideration untruly; but the purchaser afterwards signed and transmitted to the company, in pursuance of the act, a proxy paper describing him as the proprietor of the shares: Held, in an action by the company against him for calls on such shares, that he was precluded from disputing the validity of the transfer.—*Sheffield and Manchester Railway Company v. Woodcock*, 7 M. & W. 574.

RAILWAY COMPANY.

(*Mandamus to*.) The Court refused to grant a mandamus to a railway company commanding them to summon a jury to assess compensation to a claimant, where it appeared that the works calculated to damnify the claimant were still *bonâ fide* proceeding, although the applicant also claimed for land taken by the company, and considerable delay had taken place since the commencement of the works.—*Ex parte Parkes*, 9 D. R. C. 614.

And see PLEADING, 1.

RAILWAY SHARES.

(*Sale of*—*Implied indemnity by vendee against payment of subsequent calls by vendor*—*Pleading*.) On the 20th of February, 1838, the plaintiff entered into a contract with the defendant, through their respective brokers, for the sale of thirty shares in the Bristol and Exeter Railway, at 7*l.* 5*s.* per share, and the usual contract notes passed between the parties, no time being mentioned for the completion of the purchase. On the 3rd of March, the defendant wrote to the plaintiff's brokers, requesting them to "dispatch the thirty Bristol and Exeter shares forthwith," and they replied the same day, "we herewith send you transfer of thirty Bristol and Exeter shares in *blank*." This was accordingly done, and the purchase-money was paid. Calls were subsequently made on these shares, and they not being registered in the name of the defendant, and the plaintiff remaining the apparent owner of them, he was compelled to pay the calls. In an action against the defendant for not indemnifying the plaintiff for the payments and liabilities in respect of the calls: Held, that under the above circumstances there was no undertaking implied by law to indemnify against all subsequent calls, nor any evidence of such an undertaking in point of fact.

The declaration, after setting forth the contract, contained an averment that the plaintiff had "always from the time of the sale of the said shares, and the making of the said promise hitherto been *ready and willing to transfer* the said shares to the defendant, according to the terms of the said contract." This

was traversed by plea: Held, that there was sufficient evidence in the case of such readiness, but that if it had been necessary, in order to support the allegation, to prove the tender of a valid conveyance, it would not have been sufficient.—*Humble v. Langston*, 7 M. & W. 517.

RELEASE. See DEBTOR AND CREDITOR.

RENT-CHARGE. See LIMITATION ACT.

RESTITUTION. See JUSTICES OF THE PEACE, 2.

SCIRE FACIAS. See JOINT STOCK BANKING COMPANY.

SETTLEMENT.

1. (*By hiring and service—Residence.*) A yearly servant left his master's house from illness before the end of the year, and went and resided at his father's house in a different parish, where he remained to the end of the year, his master supplied him with food and medical attendance for the entire period he was absent, and paid him wages for the whole year: Held, that the pauper gained a settlement by hiring and service in the parish where he resided during his illness. (3 B. & Adol. 420.)—*Reg. v. Inhabitants of East Winch*, 4 P. & D. 342.

2. (*By renting.*) The 1 W. 4, c. 18, s. 2, dispenses with payment of the whole year's rent in settlement by payment of rates, as well as in settlement by renting a tenement.—*Reg. v. Inhabitants of Brighton*, 1 G. & D. 54.

SHERIFF.

1. (*Liability of, under 8 Ann. c. 14, s. 1—Pleading.*) Under a writ of *fi. fa.* the sheriff levied upon and removed goods not the property of the judgment debtor, and the owner recovered by action the whole proceeds of the levy. Before the removal of the goods, the sheriff had notice of a year's rent being due to the landlord, which he did not pay: Held, that notwithstanding the payment by the sheriff of the whole proceeds of the levy to the owner of the goods, he was liable under the 8 Ann. c. 14, s. 1, for removing the goods without payment of the rent. (15 East, 230; 6 Bing. 536.)

In an action upon that statute, it is no ground for arresting the judgment, that the declaration does not show on whose goods the levy was made, if it appear that they were upon the demised premises.—*Forster v. Cookson*, 1 G. & D. 58.

2. (*Return of nulla bona, when proper.*) Where the sheriff, having levied under a *fi. fa.*, has paid the proceeds of the execution in discharge of rent, under the 8 Ann. c. 14, or of a prior writ, nulla bona is a proper return; and evidence of such payments will support a plea of nulla bona to an action for a false return. (1 T. R. 729; 7 Taunt. 56; 9 Bing. 128.)—*Wintle v. Freeman*, 11 Ad. & E. 539; 1 G. & D. 93.

3. (*Ruling sheriff to return fi. fa.—Appointment of special bailiff.*) The general rule is, that where a plaintiff appoints a special bailiff, he cannot rule the sheriff to return a writ of *fi. fa.* But where such a rule had been obtained, and the object was to procure a return of nulla bona, with a view of suing out a *ca. sa.*, the Court discharged a rule obtained by the sheriff to set that rule aside, upon payment of costs by the plaintiff, and his undertaking not to bring an action.—*Harding v. Holder*, 9 D. P. C. 659.

SHIP.

(*Authority of master—Charterparty.*) Where A., the charterer of a vessel, by the charterparty agreed that on the arrival of the ship at the outward port, he would, through his agent there, supply cash to the master for the disbursements of the vessel, to be repaid by bills to be drawn by the master on the owner; and, on the arrival of the vessel there, the agent supplied goods for the use of the crew, and paid certain money demands made on the master, but did not advance any actual cash: Held, that although it was not shown that any bills were drawn by the master for the amount, A. might recover it from the owner in an action for goods sold and delivered and for money paid, the master having authority to obtain supplies of goods and money for the necessary use of the ship on the credit of the owner, independently of the express stipulation of the charterparty.—*Weston v. Wright*, 7 M. & W. 396.

SLANDER.

(*Words imputing insolvency.*) Slander for speaking of the plaintiff the following words: "I will bet 5*l.* to 1*l.* that Mr. J. (the plaintiff) was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." And in answer to the following question from a bystander, "Do you mean to say, that Mr. J., brewer, of Rosehill, has been to a sponging-house within this last fortnight for debt?" the defendant said, "Yes, I do." The jury found that the words were spoken of the plaintiff in the way of his trade: Held, that the action was maintainable, and that the verdict was right, as it was plain from the conversation that the words were spoken of the plaintiff in his character of a brewer.

Semble, also, that the words were actionable independently of that, because they must necessarily affect the plaintiff in his trade and credit.—*Jones v. Little*, 7 M. & W. 423.

SMALL DEBTS' ACT. See **INFERIOR COURT.**

SPECIAL CASE.

Where a verdict was taken for the plaintiff, subject to the opinion of the Court on a special case to be stated, and the defendant, before the case was settled, became bankrupt, the Court refused to set aside the verdict and enter it for the defendant, but ordered a new trial.—*Cottam v. Partridge*, 9 D. P. C. 629.

STAMP.

1. (*Double stamps.*) A deed, conveying certain lands in trust, and also containing a declaration of a similar trust with respect to government stock, is not to be considered two deeds under the Stamp Act (55 Geo. 3, c. 184), and one stamp is sufficient.—*Doe d. Hartwright v. Fereday*, 4 P. & D. 287.
2. (*On indenture of apprenticeship.*) By an indenture of apprenticeship, the apprentice was bound to serve his master for five years and a half. By a deed of assignment, reciting, that instead of providing the apprentice with certain wages, stipulated for in the original indenture, the new master would find him in food, lodging and washing, for the remainder of the said term of five years and a half, and one year more; the apprentice was assigned to the new master for that additional term: Held, that this deed was liable only to an ordinary 1*l.* assignment stamp.—*Morris v. Cox*, 9 D. P. C. 661.
3. (*On bond.*) A bond conditioned to secure a principal sum, with interest at five per cent., commencing from a previous day, is only liable to stamp duty on the

principal sum. (4 B. & Ald. 204; 1 M. & Rob. 115; 5 C. & P. 96, 419; 8 Bing. 146; 2 Ad. & E. 9.)—*Barker v. Smark*, 7 M. & W. 590.

TENDER.

1. The evidence of a witness called to prove a tender was as follows: "I went to the plaintiff, and told him I came with the amount of the defendant's bill. The plaintiff said he would not take it, it was not his bill. I offered it to him as the amount of his bill:" Held, that this was a good tender, and that the plaintiff might have accepted the sum tendered without thereby making any admission that no more was due. (8 C. & P. 259, 573.)—*Henwood v. Oliver*, 1 G. & D. 25.
2. A tender is not bad because the party demands a receipt for the sum tendered, where the other party objects on another ground, and not on that. (Peake's N. P. C. 239.)—*Richardson v. Jackson*, 9 D. P. C. 715.

TRESPASS.

1. (*Declaration in—Abutals.*) In trespass qu. cl. fr., the declaration described the locus in quo as part of the sea beach, and lying between high and low water mark, and abutting landwards towards the north, on five closes particularly described. On the trial, it appeared that these abutals were not immediately contiguous to the locus in quo, but that there intervened a waste strip of shingle, which was no part of the sea-beach: Held, that the abutals were not proved.—*Webber v. Richards*, 1 G. & D. 114.
2. (*For cutting away plaintiff's land, measure of damages in.*) In trespass for cutting into the plaintiff's close, and carrying away the soil, the proper measure of damages is the value to the plaintiff of the land removed, not the expense of restoring it to its original condition.—*Jones v. Gooday*, 8 M. & W. 146.
3. (*De bonis asportatis, measure of damages in.*) A. succeeded B. in the occupation of a house, and on taking possession agreed with B. for the lease at the sum of 80*l.*, and to take the furniture and fixtures at a valuation as between an outgoing and incoming tenant. The goods were accordingly valued at 109*l.* 15*s.* 10*d.*, and the amount paid by A., and an assignment executed: The plaintiff afterwards commissioned the auctioneer who had valued the goods, to sell them, but before he could do so the sheriff entered and seized them under an execution against B., and (the same auctioneer being employed by the sheriff) the goods were sold, and produced only 73*l.*, the plaintiff himself being a purchaser to the amount of 20*l.* In an action of trespass brought by A. against the sheriff: Held, that the jury were justified in giving damages for the full amount of the valuation.—*Lockley v. Pye*, 8 M. & W. 133; 9 D. P. C. 744.

TURNPIKE ACT.

The words "inclosed lands," in the 97th and 98th sections of the Turnpike Act, 3 Geo. 4, c. 126, mean lands which are actually inclosed and surrounded with fences; and therefore where lands situate on the Downs were not fenced off, although private property: Held, that a surveyor appointed by the commissioners might take materials for the repairs of a turnpike road, without the order of justices mentioned in the 98th section, such lands not being within the meaning of the words "inclosed lands" contained in that section. But it is otherwise where the land is surrounded by a fence, though it be out of repair.—*Tapnell v. Crosskey*, 7 M. & W. 441.

UNSOUNDNESS. See WARRANTY.

USE AND OCCUPATION.

1. (*When maintainable for house burnt down.*) Where an upper floor of a house was occupied at a rent payable quarterly, and during the currency of a quarter the house was burnt and rendered uninhabitable, it was held that the landlord was nevertheless entitled to recover, in an action for use and occupation, at least the amount of rent for the occupation up to the time of the fire from the quarter-day preceding.—*Packer v. Gibbons*, 1 G. & D. 10.
2. Where a party is let into possession of land under a contract of purchase, which afterwards goes off, he is liable to an action for use and occupation at the suit of the vendor, for the period during which he continues in possession after the contract went off. (9 Ad. & Ell. 849.)—*Howard v. Shaw*, 8 M. & W. 118.

VARIANCE. See AMENDMENT.

VENDOR AND PURCHASER.

(*Action for not completing purchase—Measure of damages—Pleading.*) Where a party has been let into possession of lands under a contract of purchase, but does not complete the purchase, and refuses to pay the purchase-money, and no conveyance is executed, the vendors cannot recover from him the whole amount of the purchase-money, but only the damages actually sustained by his breach of contract.

In assumpsit by the vendor against the purchasers of land, the declaration stated, that in consideration of the plaintiff's selling to the defendants certain land, to be paid for as soon as the conveyance should be completed, the defendants promised to purchase and pay for the same. Averment, that although the plaintiff had allowed the defendants to enter into possession of the lands, and had always been ready and willing to make a good title, and offered the defendants to execute a conveyance, and would have tendered a proper conveyance, but that the defendants discharged him from so doing; yet the defendants did not regard their said promise, and did not pay the plaintiff the purchase-money, or any part thereof. Plea, that no conveyance had ever been made or executed to the defendants: Held, on general demurrer, that the plea was bad, and the declaration good.

Quære, whether the declaration would have been sufficient on special demurrer. (Doug. 684.)—*Laird v. Pim*, 7 M. & W. 474.

WAGER.

(*On horse-race, when good.*) A wager of 50*l.* to 1*l.* that a certain horse has not won a race already run, is lawful.—*Pugh v. Jenkins*, 1 G. & D. 41.

WARRANTY.

(*Of horse—Unsoundness, what is.*) Defective formation, or badness of shape, which has not produced lameness at the time of the sale of a horse, although it may render him more liable to become lame at some future time, (*e. g.* "curby hocks") is not an unsoundness. (1 M. & Rob. 299.)—*Brown v. Elkington*, 8 M. & W. 132.

WRIT OF ERROR.

(*When waived.*) In debt for several penalties, it was agreed at the trial that the plaintiff should recover a verdict for one penalty only, and that the others should be given up: Held, that the agreement prevented the defendant from bringing a writ of error.—*Apothecaries' Company v. Harrison*, 4 P. & D. 292.

EQUITY.

[Containing 2 Beavan, part 3; 3 Beavan, part 1; 1 Craig and Phillips, part 1;
4 Younge and Collyer, part 2.]

ACCOUNT.

(*Jurisdiction.*) The mere existence of cross demands, not sufficient ground for restraining action at law on account stated.—*Norris v. Day*, Y. & C. 475.

ADMINISTRATION OF ASSETS.

1. (*Costs in creditors' suit.*) An order for payment of costs as between party and party having been made at a former hearing, since which the assets had turned out to be insufficient for payment of the debt and costs, the extra costs were given upon subsequent further directions.—*Sutton v. Doggett*, 3 B. 9.

2. (*Probate and legacy duty.*) Pending a suit for administration, and before the accounts were taken, the Attorney-General presented a petition for payment out of the assets of a sum which under false representations had been returned to the administrator, as overpaid in respect of probate duty, and also for the amount of legacy duty which would be payable by the administrator in respect of his share of the residue, none of which appeared to have been appropriated: Held, that the application was premature as to both points, leaving it to be decided at a future stage, as to the probate duty, how far the money improperly repaid was a primary charge upon the fund.—*Hicks v. Keat*, 3 B. 141.

See DEBTOR AND CREDITOR.

ADVERSE POSSESSION.

(*Lessee.*) *Semble*, that nonpayment of rent, where rent is reserved, is adverse possession in lessee.—*Exp. Jones, Re St. Phillip's Bridge Company*, Y. & C. 466.

ARBITRATION.

(*Reference by court of law.*) Several suits and actions having been referred by consent, and the reference having been made a rule of a court of law, it was held irregular in the plaintiff to serve a subpoena to hear judgment, and to put down the causes for hearing.—*Ambler v. Tibbutt*, 2 B. 442.

BANKRUPT. See COSTS.

CHARITY.

1. (*Absolute alienation—Attorney-general.*) Where there has been an absolute alienation of the lands of a charity, it is incumbent on those who claim under it, to show that it was for the benefit of the charity, but the case being one of great hardship, the Court ordered it to stand over, to give time to the Attorney-General to take it into his favourable consideration.—*Attorney-General v. Brettingham*, 3 B. 91.

2. (*Charitable purposes—Subscription.*) In 1742 a fund was raised by subscription by the inhabitants of Lewes, and laid out in the purchase and erection of a

place of reception for persons "sick of the small-pox, or other infectious disorders:" Held, that this was a charitable foundation, and that the inhabitants could not authorize the trustees to sell the premises and apply the proceeds to some other local public purposes, such as lighting and paving.—*Attorney-General v. Kell*, 2 B. 575.

3. (*Gift to corporation—Superstitious uses.*) *Semble*, where property was devised by a member of a company, who also was deemed by the Court to be a trustee for the company, "in aid of the maintenance of the poor men and women of the mystery and community aforesaid for ever," being the same terms as those contained in the company's license to hold in mortmain, that the property would have been subject to the charitable jurisdiction of the Court, but that as it was subject to superstitious uses exhausting its whole value, it had become vested in the crown by 1 Edw. 6, c. 14, and had by the crown become regranted to the corporation by the different statutes and instruments referred to in the case of the same name, reported ante, p. 151.—*Attorney-General v. The Fishmongers' Company*, 2 B. 588.
4. (*Increase in value—Implied gift of the whole.*) Testator first devising a property to the Coopers' Company upon the condition and for the purpose of supporting a school, proceeded to give 8*l.* of the rent, which he described as being then 11*l.*, for different charitable objects, partly connected with the school, partly not, and the remaining 3*l.* to be put into the box of the Coopers' Company, for the repair of the school when wanted, which he trusted they would speed to avoid the *danger and penalty* that followed, viz. a gift over to another company upon their default; the rent of the property afterwards increased to 75*l.*: Held, that the increased rent was to be applied to the same purposes, in the same proportions as the original, which would give 3-11ths to the company subject to the charge of repairs.—*Attorney-General v. The Coopers' Company*, 3 B. 29.
5. (*Residue—General practice.*) Where a testator having shown only a general purpose to give to a charity, proceeds to direct specific appropriations of the fund, which do not exhaust the whole, the residue nevertheless will go to the charity, and not to the trustee of the gift.—*Attorney-General v. The Drapers' Company*, 2 B. 508.
6. (*Sale in fee—Partial avoidance.*) The trustees of a charity are not justified in selling the fee of the property; but where such a conveyance was set aside, the Court revived a lease that had been merged on the estate avoided.—*Attorney-General v. Kerr*, 2 B. 420.

CHOSE IN ACTION.

- (*Voluntary assignment—Insolvent.*) Voluntary assignments of chose in action held bad against insolvent assignees, the right to chose in action being immediately transferred to them by the insolvent acts.—*Norcutt v. Dodd*, C. & P. 100.

CHURCH PROPERTY.

- (*Charge on canonry.*) The Court gave effect, by an injunction and receiver, to an assignment, by way of charge, of a canonry of Windsor; the duties of such canonry, which consisted of residence in Windsor Castle during twenty-one days in the year, and attendance at divine service during the same period,

not appearing to the Court to be for the benefit of the public.—*Grenfell v. The Dean and Canons of Windsor*, 2 B. 544.

(See unreported case of *Butcher v. Musgrave*, in the Common Pleas, as to ejectment brought by another mortgagee against the same party.)

And see TRUSTEE.

CHURCH RATE.

(*Jurisdiction—Ecclesiastical Court.*) Even assuming, as appears to be the state of the law, that the 53 Geo. 3, c. 127, s. 7, which gives jurisdiction to magistrates in cases of church rate, where the amount is under 10*l.*, and neither the validity of the rate nor the liability of the party is in question, takes away the jurisdiction in such cases; yet a proceeding in the Ecclesiastical Court to recover a rate under 10*l.* is not bad *ab initio*, as it is not known till the defendant has answered, whether he means to dispute either of the above points. Consequently the Court refused a habeas corpus to discharge a prisoner after judgment by default by the Ecclesiastical Court for non-payment of a rate of 2*l.* 5*s.*—*Re Baines*, C. & P. 31.

COMMON.

(*What words will pass.*) A conveyance by lord of the manor of P. of "all those messuages, lands, tenements, commons, wastes, woods, underwoods, and the soil of the woods and underwoods of P." held to pass the soil of the common.—*Caton v. The Croydon Railway Company*, Y. & C. 405.

COMPOSITION DEED.

(*Fraudulent preference.*) Where a banking company agreed to advance a certain sum for the purpose of securing to the creditors of a trader, including themselves, a dividend of 10*s.* in the pound, and also for the purpose of setting the trader up in business, on the repayment of the sum advanced being guaranteed to them by deed, and they severally obtained payment or security for the payment of the whole debt due to them: Held, that this was a fraud upon the guarantors, from which, upon action brought by the bank, they were entitled to relief by injunction.—*Pendlebury v. Walker*, Y. & C. 424.

CONTRIBUTION.

(*Joint guarantee—Parties.*) Where a variety of parties by one deed entered into a guarantee to the amount each of a certain specified sum: Held, that there was no contribution between them, and that one of them could alone maintain a bill to avoid the guarantee for fraud.—*Pendlebury v. Walker*, Y. & C. 424.

CONVEYANCE.—See COMMON; TRUSTEE.

COPYRIGHT.

- (*Equitable title—Assignment.*) After plaintiff had obtained equitable title to copyright of foreign music by assignment without memorandum, but before he obtained the legal title, the work was imported and sold by other parties, not the defendant, bill for an injunction against the defendant who sold the work after the plaintiff had obtained the legal title also, was dismissed, the Court stating at the same time, that an equitable title to copyright might be protected by injunction.—*Chappell v. Purday*, Y. & C. 485.
- (*Laeches.*) Injunction to restrain breach of copyright refused on the ground of delay, where the piratical publication had been commenced with notice of

the plaintiff six years and a half, and been finished a year and a half, before bill filed.—*Lewis v. Chapman*, 3 B. 133.

3. (*Rights of foreigner.*) The right of a foreigner to copyright, which is expressly recognised by the 1 & 2 Vict. c. 59, existed even under the previous statute, where at least the work, though composed or written abroad, was first published here.—*Chappell v. Purday*, Y. & C. 485.

CORPORATION.

(*Fraud—Right of proprietor and managers.*) Held, on demurrer, that the proprietors of an association having obtained an act of parliament for its incorporation, and the creation of 400 shares of 50*l.* each, and being at the time sole managers and members of the corporation, had no right to apportion the shares among themselves without accounting to the corporation, when formed, for the full value at par of the shares appropriated. The bill contained charges of fraud and misrepresentation.—*The Society for the Illustration of Practical Knowledge v. Abbott*, 2 B. 559.

See MUNICIPAL CORPORATION.

COSTS.

1. (*Bankrupt assignees.*) Neither the official nor the other assignees of a defaulting trustee, whose estate had been distributed under the bankruptcy, was allowed their costs.—*Williams v. Nixon*, 2 B. 472.
2. (*Motion—Partial failure.*) Where part of a motion being of course, and the other not so, the party moving fails as to the latter part, he will have to pay the costs of the whole.—*Murray v. Walter*, C. & P. 114.

DEBTOR AND CREDITOR.

(*Money in court—Finality of decree.*) A person having a claim against the estate of A., in respect of a breach of trust committed by him and his co-trustee, filed a bill against such trustee and the representatives of A., in which a decree was made declaring the liability of the latter, but reserving the question as to the liability of the co-trustee, and directing enquiries as to the sufficiency of A.'s estate. Money, part of A.'s estate, was paid into Court in this cause; but another suit being afterwards instituted for the general administration of A.'s estate, such money was ordered to be carried to the account of the latter suit, subject to costs of the former.—*Smith v. Birch*, 3 B. 10.

DECREE.

1. (*Correction of 45th general order.*) The above order of 1828 only enables the Court to supply an omission in a decree or direction, and not to make a new direction. Accordingly, where an account had been directed of the real estates of testator sold since his death, and also an account of those that were unsold, and an account was sought generally of the estates sold at any time, the omission could not be supplied under the above order.—*Whitehead v. North*, C. & P. 78.
2. (*Nunc pro tunc—Lapse of time.*) The Court refused, on the ground of lapse of time, to allow a decree pronounced in 1753 to be drawn up *nunc pro tunc*.—*Withy v. Norton*, Y. & C. 266.

DISCOVERY.

1. (*Defendant's title.*) Defendant claiming to be a mortgagee of part of certain estates, and also to have an equitable lien on the whole by deposit, and insist-

ing that he was not bound to produce the deeds in his possession, which he scheduled: Held, on exceptions, to be not bound to state what part he had a mortgage on, as that would be stating the contents of his title deeds.—*Addison v. Walker*, Y. & C. 444.

2. (*Inability*.) Defendants alleging inability as a ground for not giving discovery, which they would be bound to give if they could, must show they have done their best to procure the requisite information. Accordingly, on bill filed by representatives of lessor against lessee of a mine in trust for a company, asking for information as to working of the mines which was contained in the mining books, and the defendants stated that they could not obtain inspection of the books without permission of the directors of the company: Held, on exceptions for insufficiency, that it was necessary for them to show that they had applied for such permission. (See *Murray v. Walter*, tit. PRODUCTION OF DOCUMENTS.)—*Taylor v. Rundell*, C. & P. 104.

EVIDENCE.

1. (*Belief—Payment by cheque*.) Witness, who had been solicitor of both parties, stated he believed, from a reference to his books of account, and also to a cheque, which was proved, drawn on account of A., and payable to B., for 532*l.*, that 500*l.* which was due from A. to B. with interest had been paid: Held, not sufficient evidence.—*Cator v. The Croydon Canal Company*, Y. & C. 405.
2. (*Conversations—Pleading*.) Evidence of conversations not set forth in the bill, admitted on behalf of the plaintiff, so far as to explain a partial statement of them in the answer.—*Graham v. Oliver*, 3 B. 124.

EXECUTOR.

- (*Liability for each other*.) One of two executors under a will, which directed the accumulation of a residue, held not answerable for the misapplication of the dividends of stock, part of the testator's estate, which the other executor, who was the acting one, had received.—*Williams v. Nison*, 2 B. 472.

FRAUD. See CORPORATION DEED; CORPORATION; INJUNCTION.

GENERAL ORDERS. (*August 26, 1841*.)

N. B. These orders, which are signed only by Lord Cottenham and Lord Langdale, contain many important alterations in the practice and pleading of the Court.

HUSBAND AND WIFE.

- (*Fraud on marital right*.) Although generally mere silence by the intended wife, as to the existence and disposal of property belonging to her, and consequent ignorance of the husband up to the time of marriage, will be sufficient to avoid a settlement made by the wife in contemplation of the marriage, yet where the evidence did not show that "the intended husband" was the one she actually married, and the undisclosed settlement was made two months before the marriage, such settlement, which was for the benefit of herself and the children by a former husband, of property coming from such husband, was held good.—*England v. Downs*, 2 B. 522.

INJUNCTION.

1. (*Legal grounds—Fraud*.) Injunction to restrain action brought by architect for his commission, alleging fraud in taking gratuities from tradesmen, dissolved at hearing, such fraud being a defence at law.—*Norris v. Day*, Y. & C. 475.

2. (*Legal and equitable grounds.*) Defendants at law having three grounds of defence to action, of which two were legal and one equitable; the injunction which the Master of the Rolls had continued to the hearing, was dissolved on appeal; because, if the legal grounds were good, the aid of the Court was not wanted, if bad, the Court would leave the verdict as to damages as a measure of amount to be paid into Court.—*Barnard v. Wallis*, C. & P. 85.

And see ACCOUNT.

INTEREST.

- (*On money paid into Court.*) Where a party holding property subject to a charge had been ordered, with his consent, to pay the amount into Court, with the interest, on a certain day, and made default on the day, he was ordered to pay further interest on the principal only.—*Wilkinson v. Charlesworth*, 2 B. 470.

INTERPLEADER.

- (*Acknowledgment of title.*) It is not a conclusive reason for refusing an injunction to a plaintiff in an interpleader suit, that he should have done some act amounting to a recognition of title in one of the defendants, as by paying rent to him, where such act of recognition can be clearly and satisfactorily explained, as it was in this case, where the tenant of alleged testator had paid rent to devisee in ignorance of there being any dispute as to validity of will.—*Jew v. Wood*, C. & P. 185.

JOINT STOCK COMPANY.

- (*Public officer.*) *Semle*, that in a suit against a joint stock company for an injunction, on the ground of fraud practised by the directors on the plaintiff, the public officer sufficiently represents the company; but in this case a shareholder, who was assignee of the company's claim, was also joined with him as defendant.—*Pendlebury v. Walker*, Y. & C. 424.

JURISDICTION.

1. (*Habeas corpus—Ecclesiastical Court.*) The jurisdiction which the Court of Chancery has upon *habeas corpus* over the acts of the Ecclesiastical Court applies only where those Courts have exceeded their jurisdiction, and not where they have improperly exercised it. Accordingly, objections taken to a *significavit*, on the ground that it did not sufficiently show the defendant to have been regularly cited, and that the Ecclesiastical Court could not, according to its own practice, proceed to judgment in the absence of defendant, were not entertained. The Court, however, will consider how far the *significavit* is in point of form in accordance with the statutes under which it is issued; but it was held not necessary that the memorandums indorsed on the writ *de contemptu capiendis* should show that all the formalities prescribed by the act 5 Eliz. c. 23, have been complied with.—*Re Baines*, C. & P. 31.
2. (*Validity of will.*) Although Courts of Equity have not any primary jurisdiction to try the validity of a will, yet where any such question arises as to a will of land, in a case brought before them with a view to other equitable relief, as to enforce a trust, or where the property is equitable, they have such jurisdiction; and although it is their settled practice not to exercise it without a reference to a Court of Law, by directing either an issue of *deviseavit vel non*, or an ejectment, such reference is for the information of the Court, and the Court may at its option direct either an issue or an ejectment, without the consent of the devisee.

The cases of *Kerrich v. Bransby*, 7 Bro. P. C. 437, and *Andrews v. Powys*, 2 Bro. P. C. 904, are not, if rightly understood, authorities against the jurisdiction; and Lord Hardwicke mistook their purport in *Bennett v. Vades*, 2 Atk. 324.—*Middleton v. Sherburne*, Y. & C. 358.

3. (*Vendor and Purchaser—Election*.) A vendor having taken a bond from the purchaser, brought an action upon it, and also filed a bill to enforce his equitable lien on the land sold: Held, that he must elect which Court he would proceed in.—*Barker v. Smark*, 3 B. 64.

And see CHURCH RATE.

LAPSE OF TIME.

- (*Unascertained right*.) Lapse of time is not a bar in the case of a right, of which the ownership is not ascertained. Accordingly, where a canal company having in 1802 purchased part of a common, of which the title was then uncertain, and the price was settled by commissioners according to the act, and ought according to the provisions of such act to have been paid into the Court of Chancery, which was not done, and an act was passed in 1827 for the inclosure of the common, under which an award was made in 1837 establishing the title of the plaintiffs to the lands in question, and they shortly after filed their bill for the purchase-money: Held, independently of other grounds, such as that the company could not be in a better position, for having neglected to pay the money into Chancery as they ought to have done, that lapse of time was no bar, the title of plaintiff not having been ascertained till 1837.—*Cator v. The Croxson Canal Company*, Y. & C. 405.

And see DECREE.

LUNATIC.

- (*Allowance to an old servant*.) Annuity of 60*l.* given to old servant of lunatic, who retired on account of age, the next of kin consenting.—*Re The Earl of Carysfort*, 1 C. & P. 76.

MARRIAGE SETTLEMENT.

1. (*Construction—Covenant*.) By a settlement, reciting that the intended wife had 1500*l.* which the husband was to have for his own use, and had also a vested reversionary interest in a share amounting to 6000*l.* of the real and residuary personal estate of a testator, subject to a life estate, it was witnessed that in consideration of the marriage and of the sum of 1500*l.* then in the possession of the wife, and of the said vested interest, the husband covenanted for payment after his death of the sum of 4000*l.* upon the trusts of the settlement, with a proviso that his heirs, &c. should first pay all his other debts, and should not be bound to pay the 4000*l.* unless his assets were more than sufficient for payment of all his other debts. The husband became a bankrupt before the death of the tenant for life, but died after him: *Seemle*, that the settlement did not operate as a purchase of the wife's reversionary interest, the consideration so far as regarded that being only as to what the marital right might give to the husband out of such share, if it fell into possession during the coverture: And held at any rate, that the husband's assignees were not entitled to receive the share without performing the covenant.—*Corshie v. Free*, C. & P. 64.
2. (*Future property of wife*.) Held, that a covenant by husband to settle any money that might devolve by will or otherwise to the intended wife, did not embrace a legacy bequeathed to her for her separate use; and on her death

intestate, it was held to belong to the husband *jure mariti*.—*Drury v. Scott*, Y. & C. 264.

MARRIED WOMAN.

1. (*Charge on separate estate—Debts.*) The right of a married woman to charge her separate use does not rest upon the supposed exercise of a power, but is incident to her separate ownership; and *semble*, therefore, that the creditors of a married woman are entitled without special charge to the assistance of the Court in obtaining payments out of the separate estate.

In this case a married woman having real estate settled to her separate use for life, with a general power of appointment, made a will charging the estate with her debts; the plaintiff was creditor under a written agreement, but the bill was filed on behalf of the other unsatisfied creditors also; and the Court referred it to the master to enquire what debts there were to be paid under the provisions of the will, reserving the question, whether debts resting on a verbal engagement were payable.—*Owens v. Dickinson*, C. & P. 43.

2. (*Consent—Minor.*) The Court refused to take the consent of a married woman who was a minor to the payment of a sum of money out of Court.—*Stubbs v. Sargon*, 3 B. 496.

MASTER.

- (*Incapacity.*) A master in ordinary having become permanently incompetent through illness, the matters pending before him were transferred to the master in rotation, with liberty to adopt the proceedings already had.—*Attorney-General v. The Haberdashers' Company*, 3 B. 130.

MASTER'S REPORT.

1. (*Apparent error.*) Where no objection had been carried in, and no exception taken, but the finding, which was as to the priorities of mortgages, was inconsistent with the facts stated in the report, the Court refused to act upon it, leaving it to the parties interested to get rid of the finding as they might be advised.—*Gregory v. West*, 2 B. 541.
2. (*Wrong valuation.*) Over estimate in value no ground for exception to master's report, where he had not proceeded on a wrong principle.—*Oliver v. Adderley*, Y. & C. 423.

MORTGAGE.

1. (*Annual rests.*) A. having agreed for the purchase of part of a property, subject to a mortgage, entered into possession without paying the purchase money, and afterwards took a transfer of the mortgages on the whole, upon which an arrear of interest, less than the unpaid purchase money, was then due: Held, that the rule applied, that an account will not be given with annual rests against the mortgagor where there was an arrear of interest at the time of his taking possession.—*Finch v. Brown*, 3 B. 70.
2. (*Annual rests—Subsequent liability.*) Although generally a mortgagee does not become liable to account with annual rests unless he waits at the time of taking possession, yet where the arrear of interest which then subsisted, and which excluded the right to annual rests, became by subsequent arrangements with the mortgagor converted into principal, the Court directed the account with annual rests.—*Wilson v. Cluer*, 3 B. 136.
3. (*Foreclosure—Enlargement of time.*) After the ordinary decree for foreclosure, the order for enlargement of time is by no means of course, and though the

order usually is for six months after the Master's report as to the amount due ; and upon payment of the interest and costs on or before the day appointed for payment of the whole, in this case five months was granted upon payment of the interest and costs within a month of the application.—*Eyre v. Hanson*, 2 B. 478.

MUNICIPAL CORPORATION.

1. (*Continued existence.*) The new corporations under the 5 & 6 W. 4, c. 76, are continuations of the old. And where a new corporation had been brought before the Court by supplemental bill, in a suit for breach of trust instituted against the old corporation, they were, on the suit being sustained, held liable to costs.—*Attorney-General v. Kerr*, 2 B. 420.
2. (*Fraud by old corporation.*) A municipal corporation held entitled to relief as plaintiffs against an alienation of their funds made previous to the 5 & 6 W. 4, c. 76, with a view to defeat the provisions of that act, by certain members of the then governing body, and in the name of the corporation, though since the passing of that act, declaring corporate properly to be held in public trust, the transaction was impeachable also by the Attorney-General ; and the members of the old corporation who were parties to the transaction were held to be personally and severally liable for the funds misapplied.—*Attorney-General v. Wilson*, 1 C. & P. 1. (See S. C. on demurrer, 9 Sim. 526 ; Law Mag. No. 51.)

NUISANCE.

- (*Encouragement—General allegation.*) A party may so encourage a party in the erection of a nuisance, as to give him an equity for an injunction to restrain an action for damages, and a general allegation of such encouragement will let in evidence of particular acts of encouragement, and is therefore sufficient statement of the equity to preclude a demurrer. As to what amounts to encouragement, *quære*.—*Williams v. The Earl of Jersey*, C. & P. 91.

PARTIES.

1. (*Fraud—Several liability.*) Where a liability arises from the wrongful act of several parties, each is severally liable for all the consequences, and there is no contribution between them.—*Attorney-General v. Wilson*, 1 C. & P. 1.

See also NEW ORDERS, 20.

2. (*Husband and wife—Fraud.*) Bill against husband and wife, among other defendants, charging fraud against the wife alone without any participation of the husband, who was stated in the bill to be imbecile : demurrer by husband allowed.—*Price v. Chippendale*, Y. & C. 469.
3. (*Legatees and next of kin.*) Where a question arises between legatees and the next of kin, as a class, as to the right to a residue, the question to be tried being only whether the residue was disposed of, it was necessary to have all the next of kin before the Court.—*Caldecott v. Caldecott*, C. & P. 183.
4. (*Misjoinder of plaintiffs.*) It is not necessary that each plaintiff should be interested in, and entitled to, every part of the relief prayed, and where a bill was filed by a woman and her children to recover trust money that had been misapplied and for appointment of new trustees, and it was alleged that the mother, having been party to the breach of trust was precluded from asking for the recovery of the money, the Court thought, that even supposing that to be so, yet she would have been properly joined with her children as plaintiff

in respect of her common interest in the appointment of new trustees.—*Buckridge v. Glasse*, C. & P. 126.

5. (*Misjoinder—Objection at the hearing.*) Testator bequeathed leaseholds to A. for life, remainder to his children, and directed A., whom he made his executor, to renew the leasehold at the proper times. He also gave to B. an annuity charged upon his residuary personal estate. A bill filed by B. for himself and also as next friend of the infants for the renewal of the leaseholds, and for payment and security of the annuity, dismissed at the hearing with costs.—*Anderson v. Wallis*, Y. & C. 336.
6. (*Numerous partners.*) Demurrer to a bill by twelve out of thirty-eight proprietors of a newspaper, for an account of monies received by him as book-keeper allowed.—*Bainbridge v. Burton*, 2 B. 539.
7. (*Undivided share.*) The trustees of a turnpike assigned to A., by way of security, such proportion of the tolls as the sum advanced by him bore to the whole sum borrowed: Held, that A. could not enforce his security without making the other lenders parties.—*Mellish v. Brooks*, 3 B. 22.

And see CONTRIBUTION; JOINT STOCK COMPANY.

PAUPER.

1. (*Costs of previous suit.*) Proceedings in a suit in the Exchequer by a pauper stayed till he had paid the costs of a previous *dises* suit in the Court of Chancery for the same matter.—*Calvert v. Booth*, Y. & C. 514.
2. (*Double character—Insolvent.*) A defendant who was made a party as executor and legatee, and who defended as pauper, having afterwards taken the benefit of the Insolvent Act, was dispaupered, as being then a party in his representative character only.—*Oldfield v. Cobbett*, 2 B. 444.

PLEADING.

1. (*Exceptions.*) Exceptions to answer held good, though they did not follow verbatim the words of the interrogatories.—*Brown v. Keating*, 2 B. 581.
2. (*Extent of relief.*) After a perishable fund, part of a general residue, had been for sometime wrongfully enjoyed by the tenant for life, who was also executor, the remainder-man filed his bill for an account simply, though he had notice of the existence of such a fund as part of the residue, and the fact also appeared by the answer, and at the hearing the common decree for account was made. On further directions the Court directed the perishable fund to be converted as from the date of the order, but the Lord Chancellor, on appeal, gave the accounts as upon a conversion made where the tenant for life proved the will.—*Lichfield v. Baker*, 2 B. 481.
3. (*Multifariousness.*) Bill by *cestui que trusts* and two of the trustees under a marriage settlement making a provision by way of covenant, against the executrix of the settlor and the remaining trustee, praying payment according to the covenant or a general administration of settlor's assets, and seeking to set aside a security claimed over the settlor's property by the defendant's trustee: Held, on general demurrer by the taker, to be not multifarious.—*Addison v. Walker*, Y. & C. 442.
4. (*Multifariousness—Revivor.*) There having been two suits, one for foreclosure by A., mortgagee, against B., mortgagor, and C. having an interest in the equity of redemption; another by B. against A. for specific performance of a contract to purchase part of mortgaged premises; and both causes having been

heard together and decree made in the first for foreclosure, with liberty both to B. and C. to redeem; and in the second for performance, with a direction that the unpaid purchase-money should be taken as part payment of the mortgage, and A. and B. died. *Semble*, that a suit by B.'s representative against A.'s representative and C. is multifarious against C.; but it was held clearly so by the introduction of other matter relating to a purchase by A. of land allotted in respect of right of common annexed to mortgaged property.—*Lloyd v. Douglas*, Y. & C. 448.

5. (*Plea—Insufficient denial.*) The bill was filed to recover back, on the ground of fraud and oppression, a sum of 1250*l.* paid by plaintiff to defendants as the balance of accounts between them; and the bill averred that neither the sum of 1250*l.* nor any other sum was due at the time. Defendants put in a plea and answer, the plea stating that a settlement of accounts had been come to, and that upon the state of accounts being ascertained there appeared to be due from the plaintiff considerably more than 1250*l.* The plea also averred that the accounts were just: Held, that this was not a sufficient denial of the statements in the bill that nothing was due, and the plea was overruled.—*Newman v. Hutton*, 5 B. 114.
6. (*Supplemental bill.*) Executors had allowed leaseholds to be enjoyed *in specie* by the tenant for life till the expiration of the term, and a bill was afterwards filed against their representatives for an account generally, and the defendants, who had only become connected with the matter after the determination of the leases, stated the residue to consist of money in the funds, but admitted possession of the leases, and the plaintiffs at the hearing waived the accounts and took the money. They afterwards on discovering the breach of trust filed a supplemental bill, upon which relief was given, notwithstanding the former decree, but without costs.—*Mehrtens v. Andrews*, 3 B. 72.
7. (*Vagueness.*) General demurrer allowed to a bill by reason of the vagueness of its statements, the bill being for an account of all dealings and transactions, and speaking of "certain dealings and loans, &c." and "some leases or assignment."—*Wormald v. De Lisle*, 3 B. 18.
8. (*Same.*) A general charge that a defendant *claims an interest* in the matter in question in the suit, is sufficient to avoid a demurrer by such defendant.—*Plumbe v. Plumbe*, Y. & C. 345.

And see NUISANCE.

PRACTICE.

1. (*Absent plaintiffs—Affidavits on belief.*) Where a plaintiff, having been ordered to pay costs, went abroad, unanswered affidavits, on belief that he did so to avoid payment of the costs, were held sufficient ground for making him give security.—*Busk v. Beetham*, 2 B. 537.
2. (*Affidavits.*) Affidavits ought to be filed in order to be used before the Master.—*Stubbs v. Sargon*, 2 B. 496.
3. (*Amendment on petition.*) After the order has been drawn up, it is too late to amend the petition and order, but a new petition must be presented.—*Re Marrow*, C. & P. 142.
4. (*Amendment—Second order.*) Plaintiff submitting to a demurrer obtained an order to amend, undertaking to do so within three weeks, having let the three weeks elapse, without amending, he obtained as of course a second similar

- order; no answer having been put in, held that the second order was not irregular.—*Nicholson v. Teile*, 2 B. 497.
5. (*Conduct of suit—Fifty-sixth order.*) This order only applies to proceedings in the Master's office, and a default committed in respect to it is no bar to an application to the Court.—*Whitehead v. North*, C. & P. 78.
 6. (*Consolidated suits—Abatement.*) Where one decree had been taken in several suits, and the suits abated, held that one bill of reviver was sufficient.—*Moore v. Elkington*, 2 B. 574.
 7. (*Dismissal—Irregular order for commission.*) Plaintiff having more than three weeks from the filing of the replication, obtained *ex parte* an order for a commission; Held, that the proper course for the defendant, in order to get the bill dismissed, was to get the order for the commission discharged in the first instance.—*Strickland v. Strickland*, C. & P. 151.
 8. (*Exceptions—Waiver.*) The plaintiff's right to except is not waived by motion for production of documents founded on admissions in answer, although such motion is not made "without prejudice to the right to except."—*Lane v. Paul*, 3 B. 66.
 9. (*Guardian ad litem.*) Guardian ad litem appointed on motion, and affidavits of fitness and no adverse interest.—*Smith v. Palmer*, 3 B. 10.
 10. (*Infant—Withdrawal from suit.*) One of the infant parties who had attained twenty-one before decree, allowed to withdraw on motion, with the costs of the application, and the suit was dismissed as to the other infant, on motion by one not a party "as next friend of the infant for the purpose of the application."—*Guy v. Guy*, 2 B. 460.
 11. (*Interlocutory orders—Deposit.*) A petition to the Lord Chancellor to discharge such an order, made at the Rolls, is in the nature of a fresh petition, and does not require a deposit.—*Richards v. Platel*, C. & P. 79.
 12. (*Notice of order.*) A party having notice of an order is bound by it from the time it is pronounced, and it was held that a party was properly committed for breach of an injunction, in which the writ had not issued.—*McNeil v. Garratt*, C. & P. 98.
 13. (*Production of documents—Costs.*) Defendants having been ordered to give inspection of documents at their office, and to produce them at the examination of witnesses at the hearing: Held, that the production on the examination of witnesses in town should be at the expense of the defendants, in the country at the expense of the plaintiff.—*Davies v. Harford*, 3 B. 118.
 14. (*Service abroad.*) Order made under 4 & 5 Will. 4, c. 82, for service abroad upon defendant trustee, and afterwards, upon his default, for a clerk in court to enter an appearance for him.—*Dodd v. Webber*, 2 B. 502.
 15. (*Service on partner.*) Where a solicitor, who was defendant in respect of matters not relating to the partnership, but in which the partners received interest as his agents, was abroad, an order made for service on the partners at their house of business was held good.—*Kinder v. Forbes*, 2 B. 503.
 16. (*Service of warrants—Arrangement.*) Where the solicitor for the plaintiff in a suit for account, had consented to serve the warrants on the defendant personally, but a receiver being afterwards appointed, his solicitor, who was no party to the arrangement, served the warrant in the usual way on the clerk in

court, between whom and the defendant communication had ceased, and the defendant in consequence had no notice of the services, and the receiver's accounts were passed in his absence: the matter was under the circumstances remitted to the Master.—*Oldfield v. Cobbett*, 2 B. 444.

PRACTICE (IN THE EXCHEQUER.)

1. (*Injunction—Service of Notice.*) Leave granted to plaintiffs to serve defendants personally, under special circumstances.—*Mills v. Pearson*, Y. & C. 468.
2. (*Misjoinder of parties.*) Objection for misjoinder may be taken at the hearing, where co-plaintiffs have conflicting interests, but not where some want interest.—*Davies v. Masterman*, Y. & C. 257.
3. (*Publication enlarged.*) Plaintiffs in an injunction suit, under the peremptory order of dismissal, allowed, under circumstances, to enlarge publication.—*Hendrick v. Abbott*, Y. & C. 255.
4. (*Return on writ—Abatement of suit.*) Where the suit abated after the issue but before the execution, on a writ of attachment, the order to revive the suits revived the attachment, and though the writ was made returnable "immediately," it was held sufficient to return it a reasonable time after the revival of the suit.—*Snowball v. Dixon*, Y. & C. 511.
5. (*Unnecessary appearance.*) Costs not given though party served with notice.—*Exp. Angell, re Trinity Lighthouse Act*, Y. & C. 496.

And see DECREE; MARRIED WOMAN; MASTER'S REPORT.

PRINCIPAL AND AGENT.

(*Broker—Fraud.*) Where a broker sold to his employer, as being the property of a third person, shares held in trust for him the broker, the transaction was set aside without entering into the question of fairness of price, at the expiration of twelve years, the fraud not appearing to have been discovered more than a year.—*Gillet v. Peppercorne*, 3 B. 78.

PRODUCTION OF DOCUMENTS.

1. (*Joint possession.*) Defendant stating by his answer that certain books relating to a concern, in which the plaintiff was stated to be a partner with defendant, were in possession of the treasurer of the concern on behalf of the several shareholders, many of whom were not parties: Held, that production could not be ordered.—*Murray v. Walter*, C. & P. 114.
2. (*Possession of agent.*) Defendant stated in his answer that he had handed over some documents to his agent in Jamaica for the purpose of defending a suit there, and that such agent having left the island, the documents were taken possession of by the receiver appointed by the Court in Jamaica. An order for their production was made with liberty to the defendant to show by affidavit the documents were not in his power.—*Morrice v. Swabey*, 2 B. 500.
3. (*Words of reference.*) The following words of reference "as by the said indenture when produced will appear," without the words "to which defendant craves leave to refer," held sufficient ground for an order of production.—*Welford v. Stainthorpe*, 2 B. 587.

And see DISCOVERY.

RAILWAY ACT.

1. (*Application of purchase-money.*) A small sum in Court arising from purchase

of settled lands, ordered to be applied in new erections, on report from master that it was necessary.—*Ex parte Shaw*, Y. & C. 506.

2. (*Same.*) Where money, the price of settled lands, was in Court under a Railway Act, the Court allowed it to be applied in part payment of a more extensive purchase "to the like uses."—*Ex parte Newton, re Manchester and Birmingham Railway Act*, Y. & C. 518.
3. (*Costs.*) Costs "in consequence of the purchase," held not to include costs of the interim investment of funds.—*Exp. Hirst, re Birmingham and Derby Railway Act*, Y. & C. 468.

RECEIVER.

(*Amount of allowances.*) There is no general rule as to the per centage to be given to a receiver, but the amount depends upon the nature of the property. Instances of different rates.—*Day v. Croft*, 2 B. 488.

SCOTCH MARRIAGE.

(*Conflicting representations—Fraud.*) The widow of an Indian officer entitled as such to a pension during widowhood, having formed a connection with a man with whom she cohabited in Scotland, they held themselves out to the world there as man and wife, though there was only one declaration to that effect proved, and that by the lady, while for the purpose of retaining the pension she continued to make half-yearly declarations of her continuing a widow: Held, on exception to master's report, that he was right in finding no valid marriage had taken place.—*Robertson v. Crawford*, 3 B. 102.

SET-OFF.

1. (*Assignment of legal debt.*) *Semble*, that the assignee of a legal debt might set it off in equity against action by debtor, but in this case the claim of plaintiff in equity against plaintiff at law was partly founded on contract.—*Clark v. Cort*, C. & P. 154 (see *infra*.)
2. (*Equitable set-off.*) Where oil having been shipped for different parties, much of it had escaped during the voyage, of which a part having been pumped up had been sold by the captain for 760*l.*, and he brought several actions against the owners of the oil for freight and average, and the defendants in such actions could not plead their right to a share of the 760*l.* as a set-off at law, because there had been no apportionment of the money among them: Held, that they might join in a bill for an account of the oil lost and sold, and apportionment of the proceeds, to establish a set-off in each action according to the amount of the proceeds which should be assignable to each.—*Jones v. Moore*, Y. & C. 351.
3. (*General principles—Collateral demands—Unsettled accounts.*) The mere existence of cross demands is not a sufficient ground for the interference of equity to set off one against the other; there must be some equity attaching to the demand, which is sought to be enforced at law (and not merely arising out of the same subject matter), as that it is an item of a complicated account which can only be taken in equity, or that there has been a breach of contract by plaintiff at law, relating to the subject matter on his action. In this case where an action was brought at law for non-acceptance of bills of exchange at stated times, being the mode of payment agreed upon between the parties in a course of dealing between them, the defendant at law was now allowed to set off in

equity what appeared to the Court an uncertain balance alleged to be due upon a complicated state of accounts.—*Rowson v. Samuel*, C. & P. 161.

4. (*Pleading.*) The right to set off must be specially asked for in the prayer.—*S. C.*

SOLICITOR AND CLIENT.

1. (*Delivery of papers.*) Where after demurrer allowed, the plaintiff's solicitor refused to proceed with the suit till payment of his costs, he was ordered to deliver up the papers to the new solicitor on the usual undertaking as to lien and re-delivery, and the further undertaking by plaintiff to prosecute the suit with due diligence.—*Cane v. Martin*, 3 B. 584.
2. (*Solicitor's lien.*) The lien of a solicitor on papers is upon the same footing as the right of any other creditor who holds a security for his debt, and it is only in case of pressing necessity, as where the property would be endangered by non-production of the instrument, that the Court will order it to be delivered, and then only upon securing to the solicitor the benefit of his lien.—*Richards v. Platel*, C. & P. 79.
3. (*Trustee and solicitor.*) The trustee of the separate estate of a married woman acted as her solicitor in three several suits relating to such property, and in one of the suits he was a party; in that suit he was allowed his costs as between solicitor and client, in the other only his costs out of pocket.—*Fraser v. Palmer*, Y. & C. 515.

STATUTES OF LIMITATION.

- (*Arrears of interest—Canal shares.*) Held, that a bargain and sale by way of mortgage, by a canal company, of their works, and the rates payable to them, &c. was a charge upon land, within the 3 & 4 W. 4, c. 27, s. 3, and that arrears of interest on the mortgage could not be recovered for more than six years. There was no covenant to pay.—*Hodges v. The Croydon Canal Company*, 3 B. 86.

And see TURNPIKE TOLLS.

TENANTS IN COMMON.

- (*Mutual rights—Injunction.*) Where five out of six tenants in common had, contrary to the wishes of the other, granted a lease to a railway company at a rent three times greater than the rent formerly got for the premises, the Court refused to restrain the dissenting tenant from removing the rails laid down by the company.—*Durham and Sunderland Railway v. Wawn*, 3 B. 119.

TENANT FOR LIFE. See WASTE; WILL, 13, 15.

TITHES.

- (*Double prescription—Pleading—Value.*) Defendant to a bill for tithes pleaded a modus of 40l. for the manor of A., and also a right by prescription in the lord of such manor and his assigns to receive tithes of all lands within it. The Court, though it considered the second branch of the prescription inconsistent with the first, as pleaded, inasmuch as a modus excluded the existence of a right to tithes in any one, and though it doubted whether a right to tithes could in law be vested in a layman and his assigns, yet looked upon the whole as a statement of a bargain (for the purchase of tithes for an annuity) which might be supported by evidence. But the evidence being of a conflicting nature, and tending in part to show that the payment of 40l. was for all the estate belonging to the owner of the manor within the parish, whether part of the manor or not, and

adverting to the fact, that the amount of payments to the parson had varied according to the different degrees of dependence in which the parson had from circumstances been held by the owners of the manor at different times, decreed for the plaintiff.—*Knight v. Marquis of Waterford*, Y. & C. 283.

TRUST.

1. (*Bankrupt.*) Property of the husband was settled, on the marriage, in trust to pay the rents, &c. "for the maintenance of the husband, wife and children, or if the trustees thought fit to permit the husband to receive during his life, but so that he should not be able to charge or anticipate." On the bankruptcy of the husband: Held, that the wife and children were entitled in the first instance to be maintained, the amount of the allowance to be settled by the master.—*Page v. Way*, 3 B. 20.
2. (*Resulting trust—Investment of stock—Evidence.*) Purchase of stock by father in the name of the son, the father continuing to receive the dividends under a power from the son, there being no sufficient evidence of an intention to make the son a trustee, and looking to the circumstances of the parties: Held to be an advancement.

In such a case, only contemporaneous acts and declarations of the parent are evidence.—*Sidmouth v. Sidmouth*, 2 B. 447.

TRUSTEE.

1. (*Breach of trust.*) Where executors were declared liable for a breach of trust in allowing leaseholds to be enjoyed by the tenant for life till the expiration of the term, and the title to such leaseholds was shown to have been bad, and not marketable: Held, nevertheless, that the value must be fixed on the footing of the actual enjoyment, and not by the price they would have fetched if sold at the proper time.—*Nuhrten v. Andrews*, 3 B. 72.
2. (*Breach of trust—Costs.*) A trustee was held entitled to the general costs of the suit (as between solicitor and client), although a partial breach of trust, arising from error in judgment, was established against him.—*Pride v. Fooks*, 2 B. 430.
3. (*Purchase by quasi trustee—Church property.*) An act of parliament empowered a rector, with the consent of the bishop, who was the patron of the living, to raise money by annuity for building a new rectory house; the bishop advanced the necessary money, and obtained a grant of an annuity, charged upon the living: Held, though there was no unfairness, that the transaction could not stand.—*Greenlaw v. King*, 3 B. 49. (Affirmed by Lord Chancellor.)
4. (11 G. 4 & 1 W. 4, c. 60—*Lunatic mortgages.*) *Semble*, that the costs of an inquiry under the act as to lunacy of mortgagee, and reconveyance from him, ought to be borne by mortgagor, there being no difference as to this between bare trustee and mortgagee. (Exp. Richards, 1 T. & W. 264, commented on.)—*Re Marrow*, C. & P. 142.
5. (11 G. 4 & 1 W. 4, c. 60—*Lunatic trustees.*) The jurisdiction given by the act to inquire in a summary way into the incapacity of trustees, not found lunatic by inquisition, does not apply to a case where the fact of lunacy is contested.—*Re Walker*, C. & P. 147.

And see EXECUTOR.

TURNPIKE TOLLS.

(*Sale of tolls by auction—Specific performance.*) Where the trustees of a road

had advertised tolls to be let by auction, subject to certain special conditions as to the mode of sale, inconsistent with the regulations prescribed by the General Turnpike Act, 3 G. 4, c. 126, s. 55, the terms of sale giving a reserved bidding to the trustees, and there was only one bidder at the sale, when the minute glass having been thrice turned, as prescribed by the act, the trustees declared their intention to make their reserved bidding: Held, that the bidder was not entitled to specific performance; but his bill was dismissed without costs.—*Levy v. Prendergrass*, 2 B. 415.

2. (*Statute of limitations.*) Turnpike tolls are not within the recent statute of limitations, 4 & 5 W. 4, c. 27, ss. 40 and 42, and consequently the right of an assignee to recover arrears is not limited to six years.—*Mellish v. Brooks*, 3 B. 22.

VENDOR AND PURCHASER.

1. (*Assignee and heirs—Special covenants.*) Where after an agreement for a lease containing special covenants on both sides as to the mode of enjoyment, and also as to granting an underlease of the premises, and a lease containing such covenants was drawn up and agreed on, but not executed, and the lessor died leaving representatives, one of whom died and the other became bankrupt, and a bill for specific performance was filed against the assignees of one representative and the heir of the other, and such assignees and heir claimed and received the benefit of the special covenants on the part of the lessee, but the assignees refused to enter into the special covenants on their part, alleging that as trustees they ought not to do so, and the heir refused also because such covenants would not have run with the land so as to bind him, if the original lease had been executed when drawn up: Held, nevertheless, that both assignees and heir were bound to enter into them to the extent of the beneficial interest they represented; the assignees, because they claimed the benefit of the special covenants on the other side, the heir for the same reason, and also because the plaintiff was not in the situation he would have been if the original lease had been executed when drawn up.—*Page v. Broom*, 3 B. 56.
2. (*Contract by tenant for life—Special reference.*) Defendant being absolute owner of a part only of the property, and tenant for life of the remainder, with a power of sale vested in trustees, at his request, and by his direction, contracted to sell as absolute owner of the whole. Plaintiff having filed his bill for specific performance as to the whole if a title could be made, or if not, so far as it could be made, with an abatement for the deficiency: The Court referred it to the master to inquire whether defendant could by application to the trustees procure a good title to be made, reserving the question as to whether plaintiff might have specific performance as to the part absolutely owned, and reserving also the costs.—*Graham v. Oliver*, 3 B. 124.
3. (*Devise subject to contract—11 G. 4 & 1 W. 4, c. 60, s. 17.*) Testatrix having an equitable fee, devised it for life with remainders over, and afterwards contracted to sell a part of it. After her death the legal estate was conveyed to the trustees of the will, the devisees in remainder being infants: Held, that a title could not be made except under the above statute on bill for specific performance, and that it was a question of title and not of conveyance.—*Farrar v. The Earl of Winterton*, Y. & C. 472.
4. (*Latent defect—Overlapping.*) Where houses were sold in different floors, and one floor overhung the other in a manner not obvious to the eye, and not no-

tioned on the plan used at the sale, which was a ground plan: The contract was held void.—*Pope v. Garland*, Y. & C. 394.

5. (*Misdescription—Leaseholds.*) A reference to a lease is sufficient notice to a purchaser of the contents of such lease; and in the case of a sale of leaseholds which were described as held under an original lease, at a rent of 86l. 14s. 2d., and the original lease contained covenants against underletting except by consent, and the real rent, which consisted of 80l., and the third of the difference between that and the under-rents had been for some time 93l. 12s. 6d., the purchaser was held to his contract, but with compensation.—*S. C.*
6. (*Mutuality—Railway company.*) Objection taken to a bill for specific performance by a railway company, that the agent of the company not having been appointed under their corporate seal, there was no mutuality in the contract, overruled on the ground of possession taken, and acts done by them, which would have made them liable.—*London and Birmingham Railway Company v. Winter*, C. & P. 57.
7. (*Sale to company—Imperfect title.*) Lessee for a long term contracted by mistake for sale of fee to company, who paid the money into Court as upon a doubtful title. Upon reference to provisions of the act, the money was ordered to be paid to lessee.—*Exp. Jones, Re St. Philip's Bridge Company*, Y. & C. 466.
8. (*Time—Essence of contract—Waiver.*) Held, on a petition under a Railway Act, which was in the nature of a bill for specific performance, that the right to resell upon default in payment of purchase-money by a particular day, was waived by accepting from the purchaser, who was and remained in possession, a warrant of attorney to confess judgment in ejectment.—*Exp. Gardner, Re The Eastern Counties Railway Act*, Y. & C. 503.
9. (*Trinity Light House Act—Expenses of purchaser.*) In purchases under this act from incapacitated persons, the expenses of interim investment are expressly given to the owners of the property; but there is no such direction as to money paid into Court and invested under the acts by reason of doubtful title. On a purchase from an incapacitated person, a bona fide objection being taken to the title, the expenses were left to fall on the vendors, the Court taking notice that the purchase was made for public objects.—*Exp. Angell, Re Trinity House Act*, Y. & C. 496.
10. (*Variation arising on the evidence.*) The Court thought that a variation in the terms of the contract, being not such a one as would defeat the right to specific performance, not set up by answer but coming out on cross-examination of one of plaintiff's witnesses, who was defendants' agent, was a proper subject of inquiry; but the plaintiff accepting the variation, performance was decreed with costs.
What variations are consistent with this right to performance of original contract.—*London and Birmingham Railway Company v. Winter*, C. & P. 57.
11. (*Unauthorized agent.*) An attorney having contracted to sell to the plaintiff without proper authority, plaintiff filed his bill for specific performance against the owners, or in the alternative, for repayment by the attorney of his deposit, and the costs of the suit. The bill not being maintainable against the owners for want of authority in the agent, held that the only remedy against the latter was at law.—*Sainsbury v. Jones*, 2 B. 462.

VOLUNTARY SETTLEMENT.

1. (*Executory or not.*) By the contract for sale of an estate it was agreed that 600*l.*, part of the purchase money, should be paid in trust for A., the daughter of the vendor, and her children. By the conveyance afterwards made to the purchaser it was stated that the said sum of 600*l.* was to be paid to such persons, and upon such trusts as the vendor should appoint. The vendor afterwards by her will appointed the money to A. absolutely: Held, that she was entitled accordingly, the trust for children declared by the agreement being executory.—*Burrows v. Greenwood*, Y. & C. 251.
2. (*Imperfect conveyance.*) A father having by voluntary deed conveyed freehold and covenanted to surrender copyholds in trust for his children, devised part of the same estate to his widow, who under his will was admitted to some of the copyholds. Bill filed by children against the trustees and widow to have the benefit of the settlement: Held good as to the freeholds, but dismissed with costs as to the copyholds. (*Ellis v. Nimmo, Lloyd & Goold*, Rep. T. Sugden, 333, specially referred to.)—*Jefferys v. Jefferys*, C. & P. 138.

WASTE.

(*Working of clay pits.*) A tenant for life has a right to clay pits, (for making bricks,) if they were in a course of working by the author of the settlement; but otherwise if they were not. It was reserved for inquiry how far the working had been abandoned by him.—*Viner v. Vaughan*, 2 B. 466.

WILL.

1. (*Accumulation.*) The periods of lawful accumulation is limited to twenty-one years from the death of the testator, though it may not commence till some time after.—*Webb v. Webb*, 2 B. 493.
2. (*Advancement and maintenance—marriage of object.*) A discretionary trust for the maintenance of children during their minority, and for their future advancement in life, held not to be determined as to the maintenance by marriage of object, but only by majority; and as to the advancement to be still subsisting after marriage of female object. The trust was as to the income of a fund which was directed to be accumulated, subject to the trust, and the period of lawful accumulation had expired before the suit.—*Pride v. Fooks*, 2 B. 430.
3. (*Attainment of 25th year.*) A person attains his twenty-fifth year on the completion of his twenty-fourth.—*Grant v. Grant*, Y. & C. 256.
4. (*Contingency—After.*) Where after life estates to A. and B. other life estates was given to M. and N., with cross-limitations between them if either M. or N. should "die after the deaths of A. and B.": Held, that the latter words did not import a contingency, but only a recognition of the previous life interest in A. and B.—*Franks v. Price*, 3 B. 182.
5. (*Conversion—Partial failure of purpose.*) Upon a devise for life followed by a direction to sell and divide the proceeds among certain persons, and if living at the death of tenant for life, one of such persons having died before: Held, that the heir of testator was entitled to the share.—*Exp. Pring, Re London Bridge Act*, Y. & C. 507.
6. (*Conversion—"Personal estate"—Charity.*) A testator having both real and personal estate, gave his real and personal estate in trust to be converted into money, and he then gave 600*l.* "out of his personal estate" in trust for a charity, and he also gave the residue, which he describes as consisting all of personalty,

to other charities: Held, that the gifts to the charities both of 600*l.* and the residue were goods only in the proportion that the personalty bore to the realty, and that the terms of the will did not amount to such a conversion out and out as entitled the next of kin to the proceeds of the realty, but that such proceeds went to the heir.—*Johnson v. Woods*, 2 B. 409.

7. (*Equitable assets*.) Testator first directed all his debts to be paid, he afterwards in another part of his will gave all his personalty "after and subject to the payment of his debts and legacies," to certain parties: Held, that the real estate was not charged.—*Price v. North*, Y. & C. 511.

(N.B. A petition of rehearing is now pending.)

8. (*Estate tail by implication*.) The certificate of the Court of Common Pleas in the case of *Franks v. Price*, 5 Bing. N. C. 37, Law Mag. No. , to the effect that on a gift of real and personal estate to A. and B. for life, with estates tail to their issue in certain events only, as it was held, followed by a limitation over on a general failure of issue male of A. and B., estates tail were raised by implication on A. and B.; adopted by the Court.—*Franks v. Price*, 3 B. 182.

9. (*Executory trust*.) Although some of the trusts in a will were clearly executory, and although in the case of the limitations of which the construction was in issue, the trustees were directed to convey, yet the trusts were not held to be executory, so as to vary the rule of construction applicable to trusts executed.—S. C.

10. (*Issue, different senses in same will*.) Testator having given a residue of realty and personalty to his daughter for life, upon her death gave one moiety to her issue, using other expressions which showed issue to mean children, and in default of such issue, over; and as to the other moiety, he gave it "on the decease of his daughter without issue," on certain trusts: Held, that issue in the first clause was to be construed as children, but not in the second clause, and that the gift over of the second moiety was too remote.—*Carter v. Bentall*, 2 B. 551.

11. (*Issue directed on motion*.) Where it was essential to obtain a speedy decision as to the validity of a will, as when a contingent gift over was to take effect within a year after testator's death, upon the omission of legatee to release executor, an issue of *devisavit vel non* was granted before the hearing, with a direction that the parties disputing the will should be plaintiffs.—*Middleton v. Sherburne*, Y. & C. 358.

12. (*Leaseholds—Tenant for life—"Rents"*.) Testator gave a residue including leaseholds upon trust to permit the "rents" and annual proceeds to be received by A. for life, and after his decease to C. and D., with powers to the trustees to apply the "rents" towards their maintenance, until their shares should become vested: Held, that the leaseholds were not to be converted.—*Goudenough v. Tremamondo*, 2 B. 512.

13. (*Next of kin—Per stirpes*.) Devise of real estate in trust for the persons who at the death of testator should be the next of kin of R. D. deceased, according to the Statute of Distribution and their heirs as tenants in common; the next of kin consisted of great-grandchildren's children and the children of great-grandchildren's children: Held, that they took per stirpes.—*Mattison v. Tanfield*, 3 B. 131.

14. (*Payment of debts—Exoneration—Resulting trust*.) Testator gave his real estate

and part of his personal upon trusts out of the proceeds to pay his debts and legacies, and then disposed of the residue of monies arising from his real estates, saying nothing about the personalty: Held, that the mixed fund was the primary fund for payment of the debts, and that after taking what was required for that purpose from the two parts of it in proportion to their respective accounts, the residue of the real proceeds should go as bequeathed, the residue of personalty to the next of kin.—*West v. Cole*, Y. & C. 460.

15. (*Perishable property—Tenant for life.*) A testator having long annuities and money in different funds, after giving several sums of stock gave all the residue to A. for life, and gave other stock legacies after her death and whatever there might remain to B.: Held, that the long annuities ought to be converted, and the interest only paid to A.—*Lichfield v. Baker*, 2 B. 481. (Affirmed on appeal.)
16. (*Revocation.*) Testatrix by her will gave legacies of 200*l.* each to the seven children of J. B. and also other interests. By a first codicil she revoked the legacies of 200*l.* to the children of J. B. and all other gifts to them by the will, and in lieu thereof gave legacies of 200*l.* each to Samuel and four other of the children by name; she made a second codicil simply "cancelling all legacies left on her will to the children of J. B." By a third codicil she revoked "the legacy of 200*l.* given by a previous codicil" to Samuel: Held, that the other four legacies given by the first codicil were not revoked.—*Bunny v. Bunny*, 3 B. 109.
17. (*Specific legacy—Canal shares.*) Testator having at the date of his will fifteen and a half shares in the Leeds and Liverpool Canal, which by act of parliament were to be deemed personal estate, bequeathed "five and a half shares in the Leeds and Liverpool Canal to A., five to B., and five to C." He afterwards parted with them: Held, that the legacy not being specific, was not adeemed, there being no words of reference to the shares of the testator, and the nature of the property not altering the case.—*Robinson v. Addison*, 2 B. 515.
18. (*Trust to pay debts—Statute of limitations.*) Testator having first directed his debts to be paid out of his real and personal estate, afterwards by a separate clause provided, that if his personal estate should fall short, his executor should enter into possession of the real estate, and apply the rents in payment of the debts. The personal estate was sufficient: Held, nevertheless, that such a trust had been created so as to prevent the statute of limitations from running against the debts.—*Crattan v. Oulton*, 3 B. 1.
19. (*Vesting—Lapsed remainder.*) Devise of lands, in trust to pay rents to wife until youngest child attained twenty-one, she maintaining the children until then, and *when and so soon as* that event should happen, upon trust to pay one-fifth of the rents to the wife for life, and the remaining four-fifths he gave severally to his four daughters *nominatim* for life, with remainder to their respective children, and if any daughter died without issue, then the share of her so dying to the children of the other, and if all died without issue, then he gave all his said real and personal estate over. By a subsequent clause he gave the other fifth, after the death of wife, in like manner, by reference to the former gift. One of the daughters died without issue before the youngest attained twenty-one: Held, that there was an intestacy as to her share, such share not having become vested, and there being no general residuary devise.—*Bustin v. Watts*, 3 B. 97.

20. (*Vesting of legacy—Time of payment.*) Where there was a gift over in the event of a legatee dying "before receiving his legacy," and a legatee died after the period contemplated for payment had arrived, but without receiving the legacy, by reason of a suit having been instituted, and the money paid into Court: Held, that the gift over did not take effect.—*Whiting v. Force*, 2 B. 571.

21. (*Undue influence—Confessor.*) The influence exercised by a confessor, who had also to a great extent acted in the management of testator's affairs, held to be a sufficient ground for an issue of *devisavit vel non* as to a will containing large gifts to such confessor.—*Middleton v. Sherburne*, Y. & C. 358.

22. (*Words of recommendation.*) Testator bequeathed 10,000l. to his daughter A., the wife of B., recommending her and her husband to settle it, together with such sum of money as the husband should choose, upon A. and her children: Held, that a trust was created, the uncertainty of the addition not affecting the primary sum, and that the benefit to the children did not fail by the death of A. in the lifetime of the testator.—*Ford v. Fowler*, 3 B. 146.

23. (*Words of recommendation—Uncertainty of subject.*) Testator, after several alternative limitations in fee on the male descendants of his grandfather, and constituting "the person who should inherit his estates under his will his sole executor and trustee to carry the same, and every thing contained therein, into execution, confiding in the approved honour and integrity of his family to take no advantage of technical inaccuracies, but to admit all the comparatively small reservations which he should make out of so large a property, according to the plain and obvious meaning of his words," which clause was held to apply only to the legacies in his will, concluded by saying, that "he trusted to the liberality of his successors to reward any other of his old servants according to their deserts, and to their justice in continuing the estates in the male succession, according to the will of the founder of the family, his abovesaid grandfather." Some of the estates devised by the will had come to testator under the will of his grandfather, and others under a settlement also made by his grandfather: Held, that no trust was created; the Court considering that the intention to create an imperative trust was not sufficiently expressed, but resting chiefly on the want of certainty both as to what estates were given, and as to what interests were to be created in them.

The principles of the law as to words of recommendation considered in the judgment.—*Knight v. Knight*, 3 B. 148.

(See case of *Lord Dorchester v. The Earl of Effingham*, reported in note.)

BANKRUPTCY.

[Containing cases in 3 Deacon, Part 2, omitting cases noticed in former digests.]

PARTNERSHIP.

(Joint and separate estate—Order and disposition). At the death of one or two partners, a balance belonging to the partnership is in the hands of the bankers, of which the surviving partner draws out a specific portion, and hands it over to certain parties, for the completion of an arrangement entered into for partnership purposes before the death of the other partner, upon the understanding that if the arrangement is not completed the money shall be returned. The arrangement is not completed, but before the money is returned, the surviving partner becomes bankrupt: Held, that the money belonged to the partnership estate.—*Ex parte Leaf, re Simpson*, 287.

TRUST PROPERTY.

(Fraud—Purchase by broker.) Where the bankrupt had been employed as broker by the petitioners to sell a parcel of goods, and secretly agreed with the purchaser to share the profit and loss of the transaction: Held, that this was a fraud, and such part of the goods as remained in the bankrupt's hands at the time of the bankruptcy was ordered to be delivered up to petitioners.—*Ex parte Huth, re Pemberton*, 294.

HOUSE OF LORDS.

[Containing cases in 6 Clark and Fennelly, Parts 2 and 3, omitting cases noticed in former digests.]

ADULTERY.

1. (*Action at law dispensed with.*) The production of the record of a judgment at law in an action for criminal conversation, which is generally required, according to the standing orders of the House for the passing of a divorce bill, dispensed with, where it appeared that the husband had not been able to discover who it was that had committed adultery with his wife.—*Re Cood's Divorce*, 557.
2. (*Same.*) The same indulgence was shown where the adultery had not been discovered till after the death of the adulterer.—*Re Lardner's Divorce*, 569.
3. (*Lapse of time.*) A party was held not barred from obtaining a divorce by the lapse of nineteen years from the fact of adultery, and nine years from its admitted discovery, where he had been prevented by want of funds from prosecuting the matter sooner.—*S. C.*

PRACTICE.

1. (*Appeal—Competency.*) All objections to the form and competency of an appeal should be made before it is set down for hearing, in order that they may be referred to the Appeal Committee.—*Attwood v. Small*, 232.
2. (*Appeal—Interlocutory order—Time.*) Although the time for appealing from an interlocutory order has gone by, still, if the final decree is appealed from in time, the right of appealing from the order is saved.—*S. C.*
3. (*Appearance—Costs.*) Where a respondent has not appeared till the appeal is appointed for hearing, he may still, by leave of the House, lodge his printed case, and be heard in support of the decree, but although he has a clear case he will not be allowed his costs.—*Gordon v. Clyne*, 539.
4. (*Costs—Pauper—Printed case.*) It was held not a valid objection to a warrant for interim execution for costs, that the party obtaining it sued in *formd pauperis*, and that he did not lay before the Court, with his petition for the warrant, a printed copy of the appeal to the House of Lords, the act 48 Geo. 3, c. 151 requiring a copy only to be produced.—*S. C.*
5. (*Evidence—Answer of co-defendant.*) *Semble*, that one defendant cannot read the answers of another defendant for the purpose even of showing what was the issue between the parties, unless such defendant had also been his partner, and the suit related to partnership matters.—*Attwood v. Small*, 232.
6. (*Parties—Form of suit.*) The practice of making the agents of defendants parties, under pretence of obtaining security for costs, but in reality with the view of depriving defendants of the benefit of their evidence, strongly disapproved of.—*S. C.*

7. (*Same point.*) Circumstances in which, where defendant's agents are made parties for the sake of costs, the House of Lords will on appeal order issues to be directed, and that those persons be examined on the trial.—*Rhodes v. De Beauvoir*, 532.
8. (*Fresh evidence.*) The House will, under circumstances, depart from its general rule, and look into evidence not tendered in the Courts below.—*Attwood v. Small*, 232.

SCOTCH LAW.

(*Deathbed—Liege poustie.*) By the Scotch law, deeds executed within sixty days of the death of party, are void as against the heir; and though upon a deed of disposition of the heritage to trustees, made not within the time, a power of disposition may be reserved to be exercised within the time, yet a deed whereby without the intervention of trustees a man gave all his estate to his parents and the longer liver of them, and after the death of the longest liver then as he should appoint, was held not to confer on him any power of appointing within the sixty days.—*Gordon v. Clyne*, 539.

VENDOR AND PURCHASER.

(*Misrepresentation—Negligence.*) The decision in *Small v. Attwood*, (L.M. No. 419, Young, 407), reversed, the House being of opinion that the fact of fraudulent misrepresentation was not proved; and that, even assuming it to be so, the purchasers did not rely upon the statements made to them, but, having knowledge, or means of knowledge of the facts, declared they were satisfied with the representations; diss. Lords Lyndhurst and Wynford.—*Attwood v. Small*, 232. (See proceedings on the remitter of the suit, 3 Young & Coll. 105 and 501; L. M. No. 42 and 46).

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ABSTRACT OF THE PUBLIC GENERAL STATUTES.

(5 VICTORIA.)

CAP. 1.—An Act to authorize her Majesty's Commissioners of Woods to grant Building Leases of the Royal Kitchen Garden at Kensington, and to form and improve other Royal Gardens; and to enable the said Commissioners to purchase Lands of Copyhold or Customary Tenure. [5th October, 1841.]

CAP. 2. An Act for annexing the Mansion House, Gardens, and Grounds at Frogmore, Part of the Land Revenue of the Crown, to Windsor Castle. [5th October, 1841.]

CAP. 3. An Act to alter an Act of the Eleventh Year of King George the Fourth, for amending the Laws relating to the Pay of the Royal Navy, and an Act of the Fifth Year of King William the Fourth, to alter the Provisions of the said Act. [5th October, 1841.]

CAP. 4. An Act to continue for Three Years, and from thence to the End of the then next Session of Parliament, Two Acts relating to the Care and Treatment of Insane Persons in England. [5th October, 1841.]

The Acts 2 & 3 Will. 4, c. 107, and 3 & 4 Will. 4, c. 64, continued for three years, and to the end of the then next session of parliament.

CAP. 5. An Act to make further provisions for the Administration of Justice. [5th October, 1841.]

S. 1. On the 15th October, 1841, all the jurisdiction of the Court of Exchequer as a Court of Equity shall be transferred to the Court of Chancery.

S. 2. All suits and matters depending on that day in the Court of Exchequer in equity to be transferred, with all the proceedings therein, to the Court of Chancery, to be carried on and decided according to the practice of that Court; and all decrees and orders by the Court of Exchequer therein to be deemed and taken to be decrees and orders of the Court of Chancery; all writs issued therein returnable in the Exchequer to be returnable in Chancery: Proviso, that the Court of Chancery may direct the suits, &c., so transferred to be carried on or decided according to the practice of either Court.

S. 3. Lord Chancellor from time to time to make general orders for the taxation of costs, &c. by reason of the transfer of suits.

S. 4. Court of Chancery may on motion or petition, without bill filed, restrain the Bank of England or any other public company from permitting transfers of stock, &c.

S. 5. Instead of the writ of distringas heretofore issued in the Court of Exchequer, a writ of distringas to be issued from the Court of Chancery, according to the form in the first schedule to this act.

S. 6. Provision for the transfer of certain funds standing in the name of the Accountant-General of the Court of Exchequer to the Queen's Remembrancer.

S. 7. On the 15th October, 1841, all other stocks, funds, annuities and securities standing in the name of the Accountant-General of the Court of Exchequer, to be transferred into the name of the Accountant-General of the Court of Chancery, and to be applicable to such purposes as the same were before respectively applicable to: the officers of the Bank of England, &c., directed to make the transfer accordingly.

S. 8. The Accountant-General of the Court of Exchequer to make up accounts with the Accountant-General of the Court of Chancery.

S. 9. Stocks, &c., so becoming vested in the Accountant-General of the Court of Chancery to be entered causewise in the books; and the cash to be taken to be one common and general cash.

S. 10. Property vested in the Accountant-General of the Court of Chancery by virtue of this act to go to his successors in office.

S. 11. Certain funds transferred to the Accountant-General of the Court of Chancery to be placed to the "Account of monies placed out," &c.

S. 12. Certain other funds transferred to the Accountant-General of the Court of Chancery, and placed to the "Account of securities purchased with surplus interest, &c."

S. 13. Money directed by any act of parliament, &c., to be paid into the Bank to the credit of the Accountant-General of the Court of Exchequer to become payable to the credit of the Accountant-General of the Court of Chancery; and stocks and other securities transferable into the name of the former to become transferable into the name of the latter officer.

S. 14. Court of Chancery to make orders from time to time as to the mode of arranging of balances with the Bank, and generally for carrying this act into effect as to the transfer of property into the Court of Chancery.

S. 15. The offices of Accountant-General, Master on the Equity side, clerk to the Masters on the Equity side, clerk to the Accountant-General, clerk of the reports, and clerk examiner of the Barons, of the Court of Exchequer, abolished from 15th October, 1841.

S. 16. Proportionate parts of salaries of such offices up to that day to be paid to them.

S. 17. The books, proceedings, and documents relating to proceedings in the Court of Exchequer in equity, to be delivered to such persons as the Master of the Rolls, by warrant, shall direct, and to be deemed records of the Court of Chancery, subject to the provisions of the 1 & 2 Vict. c. 94.

S. 18. The duties of the Accountant-General and Equity Masters of the Court of Exchequer, in revenue business, to be performed by the Queen's Remembrancer, subject to order of the Court of Exchequer.

S. 19. Her Majesty empowered to appoint two additional judges assistant to the Lord Chancellor, being or having been barristers of fifteen years' standing, to be called Vice-Chancellors.

S. 20. Power to supply the vacancy occurring by the death, removal or resignation of the Vice-Chancellor to be first appointed under this act.

S. 21. But nothing herein to authorize the appointment of a successor to the Vice-Chancellor secondly appointed under this act.

S. 22. Each such Vice-Chancellor to have power to hear and determine all causes and matters depending in the Court of Chancery, either as a Court of law or equity, or incident to any ministerial office of the Court, or submitted to the jurisdiction of the Court under any act of parliament, as the Lord Chancellor shall direct; their decrees, orders, and acts, to be deemed decrees, &c. of the Court of Chancery; but no such Vice-Chancellor shall have authority to discharge or alter orders, &c., of any other Vice-Chancellor, not being his predecessor in office, nor any orders, &c., of the Lord Chancellor, unless authorized by him, or of the Master of the Rolls, or the Vice-Chancellor appointed under 53 Geo. 3, c. 24, or of the Court of Review.

S. 23. Vice-Chancellors to sit in the absence of the Lord Chancellor, or in a separate Court.

S. 24. Vice-Chancellor, if a privy councillor, to be a member of the Judicial Committee of the Privy Council.

S. 25. The Vice-Chancellors appointed under this act (and also the Vice-Chancellor appointed under 53 G. 3, c. 24, after the death, &c. of the present Vice Chancellor) to take rank and precedence next after the Lord Chief Baron.

S. 26. Provision for appointment of secretaries, ushers, and trainbearers.

S. 27. Vice-Chancellor to hold office during good behaviour, and to be removable on address of both houses of parliament.

S. 28. Oath of Vice-Chancellor.

S. 29. Lord Chancellor, with the concurrence of the Master of the Rolls and Vice Chancellor, or of any two of them, empowered to make all such orders, &c. as the Lord Chancellor may now make with the concurrence of the Master of the Rolls and Vice-Chancellor, or one of them.

S. 30. The Lord Chancellor and Master of the Rolls may direct causes, &c. depending before the latter, to be heard before the Lord Chancellor or any of the Vice-Chancellors, and causes depending before the Lord Chancellor to be heard before the Master of the Rolls; subject in each case to reversal, &c. by the Lord Chancellor.

S. 31. Power to the Lord Chancellor, Master of the Rolls, and Vice-Chancellors, to reverse or alter decrees and orders of the Court of Exchequer in suits and matters transferred by this act; subject to appeal to the Lord Chancellor.

S. 32.—34. Provide for the appointment of certain gentlemen, officers of the Court of Exchequer in Equity, to officers in the Court of Chancery, &c.

S. 35. Provisions for payment of salaries to Vice-Chancellors (5000*l.* each) and other officers.

S. 36. Provision for retiring allowance to Vice-Chancellors (3500*l.*) after fifteen years service, or on disability from permanent infirmity.

S. 37. Regulates the future salary and retiring allowance of Vice-Chancellors, appointed under 53 G. 3, c. 24, according to the same scale.

S. 38. Number of Registrars increased to ten; provisions for filling up vacancies.

S. 39. Registrars to attend each judge of the Court, as the Lord Chancellor shall direct; power to them to appoint a deputy in case of illness; on failure of appointment for two days, the Lord Chancellor to appoint.

S. 40. Clerks to the registrars increased to twelve; vacancies hereafter occurring to be filled up according to seniority.

S. 41. Appointment of three new clerks, and of the junior clerk from time to time, vested in the Lord Chancellor.

S. 42. Power of the Lord Chancellor to increase the number of clerks if necessary.

S. 43. Preserves the rights of the present registrars and clerks.

S. 44. Preserves the right of succession of the present sworn and side clerks, appointed registrars or clerks to registrars.

S. 45. Provisions for succession to offices of Master of Reports and Entries.

S. 46. Duties of registrars and clerks.

S. 47. Power to Lord Chancellor to appoint persons to keep order in the Vice-Chancellors' Courts,

S. 48. Masters, registrars, and clerks, to hold their offices during good behaviour, and to be liable to the prohibitions, &c., imposed by the 3 & 4 W. 4, c. 94.

S. 49. Power to the Lord Chancellor, &c., to remove such officers on sufficient cause.

S. 50. Provisions for certain expenses and salaries.

S. 51. Repeal of the provisions of the 3 & 4 W. 4, c. 94, as to the payment of salaries of officers.

S. 52. Salaries to registrars, masters, and clerks, to be paid out of the Suitors' Fee Fund.

S. 53. Provision for allowance to registrars for copying, &c.

S. 54. Provision for retiring annuity to the new Master in Chancery and his successors.

S. 55 & 57. Compensation clauses to Officers whose offices are abolished.

S. 56. Provision for retiring pension to registrars, &c.

S. 58. Provision in the case of surplus or deficiency of Fee Fund.

S. 59. Power to invest Surplus Interest Fund.

S. 60. Money placed out, if required to answer demands of suitors, to be called in.

S. 61. Accountant General of the Court of Chancery to pay over yearly 150*l.* to Suitors' Fund.

S. 62. Power to the Lord Chancellor to order the change of securities purchased under this act.

S. 63. Accountant General to make annual returns to parliament of the Suitors' Fund and the Fee Fund.

S. 64. Interpretation clause.

S. 65. "Barrister" to include Irish barristers.

S. 66. Act may be amended or repealed this session.

CAP. 6.—An Act to amend an Act made in the Twenty-sixth Year of the Reign of His Majesty King George the Third, intituled 'An Act to empower the Archbishop of Canterbury or the Archbishop of York for the Time being to consecrate to the Office of a Bishop, Persons being Subjects or Citizens of Countries out of His Majesty's Dominions. [5th October, 1841.]

CAP. 7.—An Act to continue until the Thirty-first day of July, One Thousand eight hundred and forty-two, such Laws as may expire within a limited Period. [5th October, 1841.]

All laws in force on the 23rd June, 1841, and which would expire at the end of this session of parliament, or before the 1st January, 1842, continued till the 31st July, 1842.

CAP. 8. An Act for funding Exchequer Bills, and for making Provision for the Service of the Year One Thousand eight hundred and forty-one. [7th October, 1841.]

CAP. 9.—An Act to provide for Payment of the Persons employed in taking Account of the Population in England. [7th October, 1841.]

CAP. 10.—An Act to continue the Poor Law Commission until the Thirty-first Day of July, One Thousand eight hundred and forty-two. [7th October, 1841.]

CAP. 11.—An Act for raising the Sum of Ten Millions six hundred and twenty-six thousand three hundred and fifty Pounds by Exchequer Bills, for the Service of the Year One Thousand eight hundred and forty-one, and for appropriating the Surplus granted in this Session of Parliament. [7th October, 1841.]

THE PRESENT SYSTEM OF TAXING COSTS.

SIR—I beg to call your attention to a question of practice of considerable importance, which appears to me to require more consideration than it has yet received. Some years ago an official circular was issued, requesting the opinions of many attorneys in the principal towns on various practical points, and amongst them, whether it would not be advisable to make an alteration in the system of taxing costs, and to allow the winning party a larger portion of costs actually incurred by him in the prosecution of a suit, than the losing party was generally called upon to pay. I gave my opinion at the time, that such an alteration would be proper, not seeing any reason why a person should incur a heavy expense in prosecuting a just claim. A considerable experience since in the practice of the Court of Chancery has confirmed me in my opinion, and I cannot illustrate the hardship of the system still existing better than by stating shortly a case which has just been determined in the Court of Review.

A partnership firm, consisting of three persons, became bankrupt about two years since, and shortly afterwards one of the partners died. The accounts were examined by persons employed by the assignees, and the assignees were allowed by the commissioners to prove a debt of 65,000*l.* against the private estate of the deceased partner, on the ground of his having abstracted partnership property for his private use. The private creditors, being dissatisfied, petitioned the Court of Review, and obtained an order appointing an inspector, who was to have liberty to employ accountants to examine the books. In a matter of this difficulty and moment the investigation could not be satisfactorily made unless accountants of great skill and experience were employed, but it was at the same time the wish and interest of the inspector to obtain such persons as cheaply as possible, and he accordingly did so, and bargained for their services. The result of the investigation was, that the accounts drawn up by the accountant of the assignees, and on which the proof was grounded, were shown to be quite fallacious; and when the matter came on for hearing, the assignees offered to compromise, and the inspector agreed that the private creditors should be paid by the assignees 17*s.* 6*d.* in the pound. He would have insisted on full payment, to which they were entitled, but the assignees agreed to allow *full costs*, that is, costs to be taxed between solicitor and client. It will readily be understood that a case of this importance and difficulty would require more than common attention on the part of the attorney. The accounts embraced transactions of more than a million sterling, and in the preparing of the affidavits in support of the petition it was necessary to consult counsel frequently, and they insisted that one of the accountants should be present at the hearing. I also felt it my duty to be present, as solicitor, at the hearing, and should otherwise have taken upon myself great responsibility. An agent could not understand all the bearings of a case of this nature, and the counsel certified that the journeys to London and all the consultations were absolutely necessary, and I and the inspector both swore to the same effect, and that the work done by the accountants was properly charged for in their bills. Notwithstanding this, on the taxation of costs

more than one-half of the sum actually paid to the accountants was struck off, also all charges for journeys to London and expenses there; the officer also disallowed all fees for consultation with counsel, excepting one, and all charges for trouble beyond what the most common and insignificant case would require. The circumstances were fully explained, but to no purpose, and I was advised that an application to the Court would not do me any service, even if I could show that all the charges were *bonâ fide* for work actually done.

I admit that there are many cases wherein it would be an injustice to throw all or even any costs upon a losing party: the scales may be nearly balanced, and a defence may be quite justifiable; but I would suggest that this should be determined by the judge who heard the case; and that, when costs are allowed, they should include all the costs reasonably incurred, and charges for all the trouble properly taken, according to the importance of the matter. In the case I alluded to I was engaged with the accountants many days wading through intricate details, and making myself master of the facts to enable me to prepare the affidavit, and for this trouble I was allowed 6s. 8d., it being considered that, however great the difficulty and responsibility may be, and however important the matter, the charges for the whole are to be comprised in the allowed common charge per folio for drawing an affidavit; and although I was obliged to redraw nearly half the affidavit, in consequence of facts elicited by a further examination of the books recommended by counsel, nothing whatever was allowed for so doing. I may also mention, that myself and agent were detained two days in court in arranging a compromise, for which the sum allowed was 1*l*.

Surely, if it be desirable to have the profession respectably filled, and practice in the Courts undertaken by proper persons, this mode of taxing bills is prejudicial. A respectable attorney would be glad to have every bill of charges properly examined; it would frequently relieve him from unpleasant observations by his clients, but on the present principle justice is not done to him; and I have no doubt that in many cases where an attorney expects that his bill will come before the taxing officer, he omits doing many things that would probably be important to the success of his case, in the belief that the allowance will not be made to him to which he is fairly entitled, and the expenses repaid which he has actually incurred. I am unable to say whether it be the fault of the taxing officers, or whether they are bound to act on an established system. In either case I would respectfully submit that the subject requires consideration and amendment, equally as respects solicitors and the parties to a suit.

I am, Sir,

Your very obedient Servant,

Leeds, 24th September, 1841.

J. S.

EVENTS OF THE QUARTER.

THE long expected change has taken place at last. Lord Lyndhurst is again Lord Chancellor: Sir Frederick Pollock and Sir William Follett are Attorney and Solicitor General: Sir Edward Sugden is Chancellor of Ireland, and Sir John Campbell is Lord Campbell with a peerage to spare, which, if he be a true Scotchman, he would doubtless be extremely glad to exchange for a pension.

It is impossible to deny the merits of the legal dignitaries and officials who have gone out, but at least equal confidence may be claimed for those who have come in, and it is the peculiar good fortune of the Conservative party that they are not likely for some time to come to be driven to shifts and expedients, to the evading of just claims, or the postponement of useful measures, by the smallness of their parliamentary majority or the paucity of distinguished lawyers in their ranks.

The Administration of Justice in Equity Bill was thrown over last year because the government could not agree how the new judgeships were to be filled: it was thrown over this year because a ministry which had not the confidence of parliament was not allowed to exercise the patronage. It was passed at once by Sir Robert Peel, and the first appointments under it (Mr. Wigram and Mr. Knight Bruce) have given universal satisfaction. Whilst these appointments were yet in suspense, rumours fixed on an eminent Irish lawyer to fill one of them, and it might be no bad policy at some future time to allow Ireland to send us a vice-chancellor in return for the many chancellors she has received at our hands.

We hope and believe that one of the first measures of the present government will be to introduce a bill to amend the doubtful clauses of the Reform Act, and effect the requisite improvements in its machinery. The number of revising barristers may then be reduced one-half, and if the judges will only take a little pains in the selection, no plausible ground of dissatisfaction will remain for the press to urge against them. As usual, some two or three have been led by an idle love of notoriety to bring down a torrent of objurgation on the rest. An utterly immaterial question—whether peers, confessedly disqualified from voting, are entitled to be registered—is unluckily raised before a gentleman who wished to display his knowledge of the constitution: he delivers a long judgment, and obligingly supplies a copy to the newspapers; this excites the ire or emulation of another metropolitan reviser, who, with equal lack of taste, delivers a judgment directly the other way; and this difference between *Tweedledum* and *Tweedledee* is instantly caught up as a conclusive proof of the incompetency of the revising barristers as a body.

It is expected that the stamp duties will undergo considerable alteration. At present some of the most critical questions to be decided by the practitioner on the occasion of a transfer relate to the stamps, and unless some clear rule can be laid down, we think that a mistake in this particular should not entail such fatal consequences. The revenue might be sufficiently protected without invalidating the whole transaction.

A good deal of discussion has been raised whether the present taxes upon attorneys and solicitors are defensible. Many think that their effect (particularly the stamp duties on articles of clerkship) is favourable to the respectability of the pro-

fession upon the whole, but we confess we do not see on what principle a finance minister can re-impose them, if his sole object be to put all classes upon an equality.

Mr. Cockburn received a silk gown shortly before Lord Cottenham resigned the seals.

NOTICES TO CORRESPONDENTS.

THE correspondent who complains of a disrespectful allusion to a class of the profession, is in error. The writer intended nothing of the sort.

It is understood that *The Monthly Law Magazine*, established some years subsequently to this work, has been discontinued. We may now therefore, without any imputation on our motives, venture to suggest that the name was rather too close an imitation of our own. Repeatedly has "*The Monthly Law Magazine*" been quoted as "*The Law Magazine*;" and repeatedly have we been the subject of remarks obviously intended for our cotemporary. Nice distinctions about rights to titles are ludicrous: the sole criterion is liability to create confusion; and if the work is to be revived, we beg leave to remind the publishers of James Smith's reply to a namesake who came to live on the same staircase: "You are James the second, and must abdicate." When "*The New Times*" was converted into "*The Morning Journal*," the proprietors candidly avowed that their original title was indefensible.

LIST OF NEW PUBLICATIONS.

A Treatise on the Law of Executors and Administrators. By Edmund Vaughan Williams, of Lincoln's Inn, Esq. Barrister at Law. The Third Edition. In 2 vols. royal 8vo. Price 3*l.* 3*s.* boards.

The Law relating to Duties on Probates and Letters of Administration in England, and Inventories of Personal or Moveable Estates in Scotland, and on Legacies and Successions to Personal or Moveable Estates in Great Britain. Also the Rules and Practice of the Legacy Duty Office in London and correct Copies of the Forms used in the Department, with Instructions for filling them up. To which is added a Summary of the Adjudicated Cases, classed under separate heads, and with references to the published Reports thereof. Third Edition, revised. By Thomas Gwynne, Esq. Comptroller of the said duties. In 8vo. Price 10*s.* boards.

Of Societies called Clubs. A Law Pamphlet. By Charles Wordsworth, Esq. of the Inner Temple, Barrister at Law. Price 2*s.* 6*d.* stitched.

The Law of Pawns or Pledges, and the Rights and Liabilities of Pawnbrokers, containing a Summary of the Common Law of Pawn, the Statutes, accompanied by Explanatory Notes, and a Collection of the adjudged Cases; together with some Historical Account of the System of lending Money on Pawns, as practised by Tradesmen, Companies, and Governments. By James Paul Cobbett, of Lincoln's Inn, Barrister at Law. In 12mo. Price 5*s.* boards.

Martin's Practice of Conveyancing; Precedents with Practical Notes. By Charles Davidson, of the Middle Temple, Esq. Barrister at Law, and Fellow of Christ College, Cambridge. Vol. 5. Part 1. Price 12*s.* boards.

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A Treatise on the Law and Practice of Injunctions. By Charles Stewart Drewry, Esq. Barrister at Law. In 8vo. Price 14*s.*

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